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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883. 4

No. ~~386.~~ 94

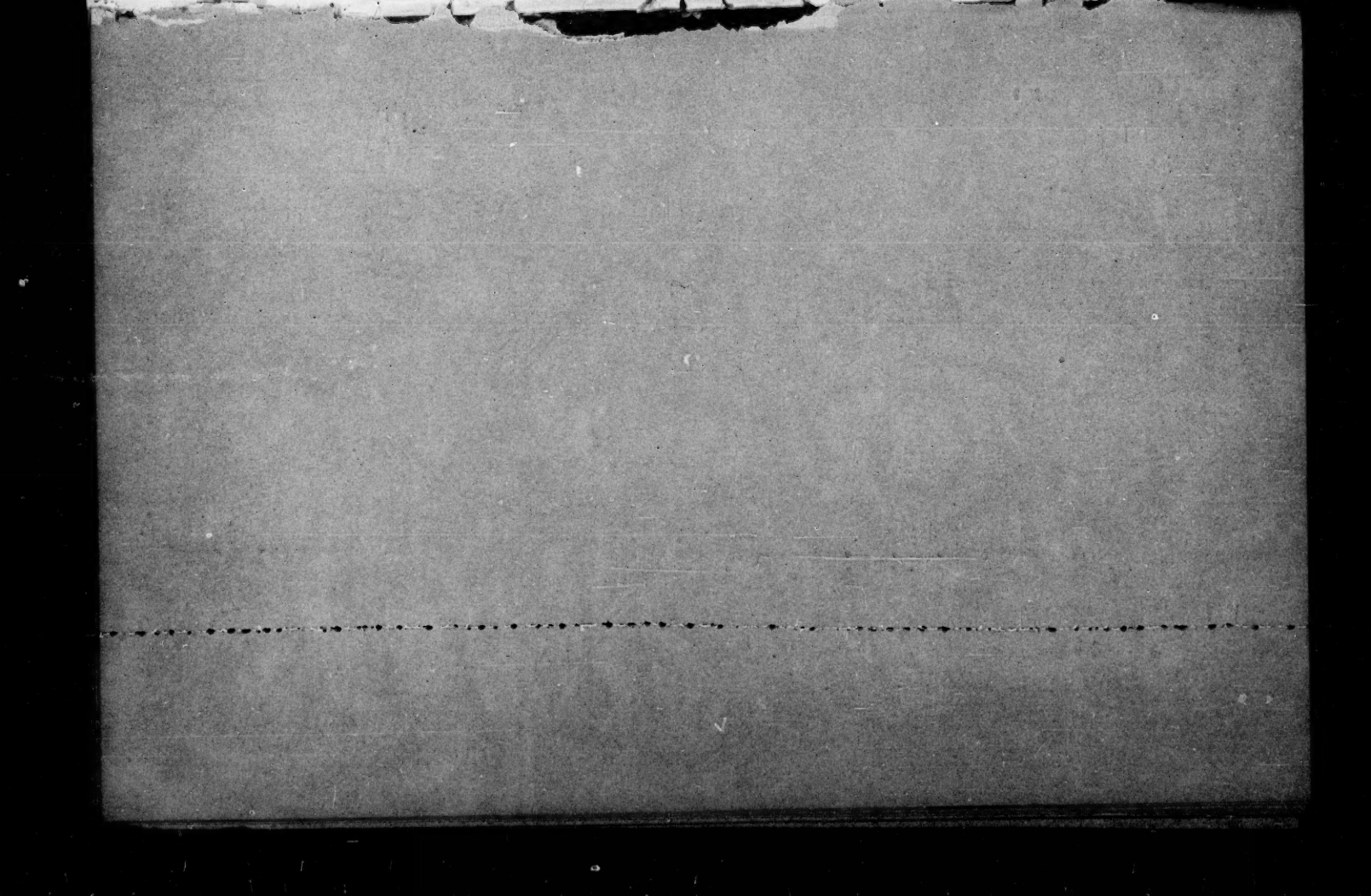
FRANK AYERS AND JOHN R. HALL, PLAINTIFFS IN ERROR,

vs.

A. E. WATSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED OCTOBER 12, 1881.



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1 *Petition.*

The United States Circuit Court, 5th Circuit, in and for the Northern District of Texas, at Waco sitting.

Be it remembered that a term of the circuit court of the United States, 5th circuit, for the northern district of Texas, held at Waco, for the April term, A. D. 1881, Hon. Andrew P. McCormick, district judge, presiding, among other, the following proceedings were had:

UNITED STATES OF AMERICA:

Circuit Court of the United States, 5th Circuit, in and for the Northern District of Texas, at Waco sitting; Hon. Andrew P. McCormick, Dist. Judge.

Be it remembered that on the 25th day of June, A. D. 1880, that the defendant, Frank Ayers and others, filed their transcript of record and proceedings from the district court in and for the county of Bell, northorn district, and State of Texas.

Cause numbered in the United States circuit court, at Waco, 34, and is in words, to wit:

2 (Endorsed, to wit:) U. S. circuit court, northern district of Texas. A. E. Watson, plaintiff, *vs.* No. 34, Frank Ayers and others, defendants. Trespass as well to try title as for damages. Filed in my office June 25th, 1880. J. H. Finks, clerk. By Wm. M. Sleeper, deputy.

Petition as follows:

THE STATE OF TEXAS, *County of Bell:*

To the honorable district court of said county:

Your petitioner, A. E. Watson, who resides in the county of Falls, State of Texas, complains of John Anderson, who resides in the said county of Bell, and of Frank Ayers and John R. Hall, who are not residents of the State of Texas, all of whom are hereinafter styled defendants, and alleges that heretofore, to wit, on the first day of August, A. D. 1877, your petitioner was seized of the following-described tract or parcel of land, lying on Cottonwood creek, in the aforesaid county of Bell, containing one-third of a league and patented to the heirs of Walter W. Daws, dece'd, viz: Beginning at a stake, from which a hackberry marked B. T. D. b'rs N. 36 E.

3 143 vrs.; thence S. 71 E., at 107 vrs., passes corner of the Kavanaugh survey, 3,767 vrs., a stake in west line of J. O. Rice survey, from which a double elm b'rs N. 26 W. 24 vrs., another elm b'rs ——

Thence S. 19 W. with the line of said J. O. Rice's survey 2,550 vrs. to a stake from which a triple elm b'rs S. 19 E. 36 vrs.; thence N. 71 W. 3,767 vrs. to a stake on hill in prairie; thence N. 19 E. 2,550 vrs. to the place of beginning; which said tract of land petitioner held as his own freehold, and quietly possessed the same until

afterwards, viz., on the 2d day of August, A. D. 1877, at which time the said defendants, with force and arms, broke and entered petitioner's close, viz., the tract of land before mentioned, and ousted and ejected your petitioner therefrom, and do still, with force and arms, hold your petitioner ousted and ejected from said land, and have, during their said unlawful occupation, broken down petitioner's grass and dug up petitioner's said ——, to his damage three hundred dollars. Wherefore he sues, and prays that said defendants be cited to answer this petition, and that upon a final hearing petitioner have judgment for his costs and damages, and for
4 a writ of restitution requiring the sheriff to place him in possession of said land; also prays for general relief, and, as in duty bound, will ever pray, &c.

GOODRICH AND CLARKSON,
For Petitioner.

The defendants will take notice that this suit is brought as well to try title as for damages.

GOODRICH AND CLARKSON,
For Pl'ff.

THE STATE OF TEXAS, *Bell County:*

L. W. Goodrich, being duly sworn, deposes and says that he is one of the attorneys for plaintiff in the petition, and that the defendants, Frank Ayres and John R. Hall, are not residents of the State of Texas.

L. W. GOODRICH.

Sworn to and subscribed before me, on this the 29th day of Aug., 1877.

W. W. UPSHAW, *Clk.*
D. C. BELL, *C.*

Filed August 29th, 1877. W. W. UPSHAW, *Clk.*
D. C. B., *C.*

5 *Demurrer and Answer of John Anderson.*

Process issued to the several defendants, and on the 5th October the following demurrer and answer filed:

Suit Pending in District Court of Bell County. Oct. Term, A. D. 1877.

A. E. WATSON *vs.* FRANK AYERS *et al.*

The defendant, John Anderson, demurs to plaintiff's petition, and says that the same is insufficient in law.

1st. Because it does not state facts sufficient to constitute a cause of action against this defendant.

2d. Because it does not set out the facts constituting plaintiff's cause of action with sufficient certainty.

Wherefore he prays judgment of the sufficiency of said petition, and that he be dismissed with his costs, &c.

FAY AND MONTEITH,
Attorneys for Anderson.

And now comes the defendant, Anderson, by his attorneys, and denies all and singular the allegations in plaintiff's petition, and of this he puts himself upon the country. Wherefore he prays judgment, &c.

FAY AND MONTEITH,
Att'ys for Def't Anderson.

And for further answer in this behalf, if such shall be nec-
6 essary, defendant Anderson says that he has no interest in the premises described in plaintiff's petition, except as a tenant, and has never claimed any other than as the tenant, first of Sterling Smith, of McLennan county, State of Texas, and afterwards of Frank Ayers of the county of ——, in the State of Mississippi, his co-defendant herein, the first of whom was, and the last of whom is, the owner of Maximo Moreno eleven-league grant of land, in Bell county, State of Texas; and that he holds under and acknowledges Frank Ayers as his landlord, and Frank Ayers has made and acknowledged him to be his tenant; and that the said relation existed prior to the commencement of this suit, and has continued to exist until the present time. That the tract of land in controversy is immediately south of the northern boundary line of the Maximo Moreno eleven-league grant, in said Bell county, in the northeastern corner of said grant, and the same, with the remainder of said Moreno eleven-league grant, is now, and was at the time when such
7 suit was instituted, the property of said Frank Ayers, who holds through certain intermediate parties, from David and Anna M. Ayers, or the estate of said Anna M. Ayers, deceased, except that the estate of said Anna M. Ayers holds certain unpaid notes to secure the purchase money for said grant.

Defendant Anderson further says that his said landlord, Frank Ayers, has bound himself to secure him in quiet and peaceable enjoyment of the said premises in controversy, and has to him and with him contracted and stipulated that he was possessed of the entire fee in said estate, and was well able to defend the same against the plaintiff, as well as all other persons claiming or to claim the same.

Wherefore he prays that said Frank Ayers shall be required, as his landlord, to come in and defend this suit for him, and for such other and further relief as he is by law and equity entitled to, &c.

FAY AND MONTEITH,
Att'ys for Anderson.

The following answer filed on the 19th April, 1879, to wit:

Suit pending in the District Court of Bell County, Texas. April Term, 1879.

A. E. WATSON *vs.* FRANK AYERS *et al.*

8 Now comes the defendants in the above-entitled cause, by their attorneys, and except to the plaintiff's petition and show the court that the matters and things therein alleged, in the manner and form therein set out, are insufficient in law to entitle said plaintiff to have and maintain his said action, and of this they pray the judgment of the court.

X. B. SAUNDERS,
W. T. RUCKER &
A. M. MONTEITH,
Att'ys for Defendants.

And for answer, if any be required of them, the defendants deny all and singular the allegations contained in the plaintiff's petition, and say that they are not guilty of the wrongs, injuries, and trespasses therein alleged and charged against them, and of this they put themselves upon the country.

X. B. SAUNDERS,
W. T. RUCKER, AND
A. M. MONTEITH,
Att'ys for Defendants.

And afterwards, on 28th April, A. D. 1879, the following amended original petition was filed, to wit:

In District Court, Bell County. Spring Term, 1879.

A. E. WATSON *vs.* FRANK AYERS *et al.*

9 Now comes plaintiff, A. E. Watson, by his attorneys, and filed this, his first amended original petition, and avers that heretofore, to wit, on the 1st day of August, A. D. 1877, he (petitioner) was seized in fee of the following described tract of land in Bell county, State of Texas, about 15 miles N. E. by north from the three forks of Little river: Beginning at the S. W. corner of league No. 8 for the S. E. corner from which an elm b'rs S. 43 E. 120 varas, another bears S. 26 W. 70 varas; thence N. 19 E. at 1,170 varas and at 1,720 v'rs branches at 2,375 varas the N. E. corner of this survey from which a hackberry marked A bears N. 75 E. 23 varas, an elm marked B bears N. 14 W. 34 v'rs; thence N. 71 W. 940 v'rs and 2,785 v'rs crossed branches at 3,508 v'rs, the N. W. corner from which a hackberry marked C b'rs N. 35 E. 195 v'rs, another marked B bears N. 36 E. 143 v'rs; thence S. 19 W. 500 v'rs, a creek at 2,375 v'rs, a mound the S. W. corner; thence S. 70 E. recrossing creek 3,508 v'rs to the place of beginning, which said tract of land pl't'ff held and possessed as his own freehold estate until afterward, to wit, the 2d day of August, A. D. 1877, at which time the said def'ts, Frank Ayers and John R. Hall and John Anderson,

with force and arms, broke and entered your petitioner's close, the tract of land aforesaid, and ousted and ejected pl't'ff there-
10 from, and do still, with force and arms, hold plaintiff ousted and ejected from said land, and have, during their said unlawful occupation, broken down petitioner's grass and dug up petitioner's soil, to his damage five hundred dollars.

Wherefore petitioner prays that said def'ts be cited to answer, and that upon final hearing petitioner have judgment for his said land, damages, and costs, and that a writ of possession issue requiring the sheriff to place petitioner in possession of said land, also prays for general relief.

GOODRICH AND CLARKSON,
Att'ys for Pl't'ff.

1st Amended Original Answer.

And afterwards, on the 29th day of April, A. D. 1879, the following 1st amended original answer was filed, to wit:

Suit Pending in the District Court of Bell County, Texas. To April Term, 1879.

A. E. WATSON *vs.* FRANK AYERS *et al.*

Now comes the defendants in the above entitled and numbered cause and, leave of the court being had, file this their first amended original plea and answer in lieu of their original answer and plea filed in this cause on the 19th day of April, 1879, and, first excepting to the plaintiff's petition, they show the court that the
11 matters and things therein alleged, in the manner and form therein set out, are insufficient in law to entitle said plaintiff to have and maintain his said action, and of this they pray the judgment of the court that they go hence without day, and recover all costs in this behalf expended, &c.

X. B. SAUNDERS,
A. M. MONTEITH, AND
W. T. RUCKER,
Def'ts' Att'ys.

Answer.

And for answer, if any be required of them, these defendants deny all and singular the allegations contained in said plaintiff's petition, and say that they are not guilty of the wrongs, injuries, and trespasses as therein alleged and charged against them, and of this they put themselves upon the country.

X. B. SAUNDERS,
A. M. MONTEITH, AND
W. T. RUCKER,
Defendants' Att'ys.

Further Answer.

And for further answer, if any be required of them, or either of

them, the defendants, Frank Ayers, alleges and shows the court that he is, and was at the time of the institution of this suit, the only just, legal, and equitable owner, in fee-simple, of the following-described tract of land, situated in Bell county, Texas, viz., eleven leagues of land granted by the government of Coahuila and
12 Texas to Maximo Moreno, in the year 1833, said grant having field-notes, as follows, viz.: situated on the left margin of the river San Andres, below the point where the creek called Lampassas enteres said river on its opposite margin, and having the lines, limits, boundaries, and land-marks following, to wit:

Beginning the survey at a pecan (nogal) fronting the mouth of the aforesaid creek, which pecan serves as a land-mark for the first corner, and from which 14 varas to the north 59° west there is a hackberry 24 in. dia., and 15 varas to the south 34° west there is an elm 12 in. dia.; a line was run to the north 22° east 22,960 varas and planted a stake in the prairie for the second corner. Thence another line was run to the south 70° east, at 8,000 varas crossed a branch of the creek called Cow creek, at 10,600 varas crossed the principal branch of said creek, and at 12,580 varas two small hackberries serve as landmark for the third corner. Thence another line was run to the south 20° west, and at 3,520 varas crossed the said Cow creek, and at 26,400 varas to a tree (palo) on the aforesaid margin of the river San Andres, which tree is called in English "box elder," from which 7 varas to the south 28° west there is a cottonwood with two trunks and 16 varas to the south 11° east there is an elm 15 in. dia. Thence following up the river
13 by its meanders to the beginning point, and comprising a plane area of eleven leagues of land or 275 millions of square varas.

And this defendant further alleges and shows the court that the land described in the plaintiff's petition and claimed by him, said plaintiff, under some pretended patent from the State of Texas to the heirs of one W. W. Daws, deceased, is embraced within the boundaries of said eleven league grant, and in conflict with said eleven league grant, which is an elder and superior title to said pretended patent from the State of Texas to the heirs of W. W. Daws, dec'd. All of which this defendant is ready to verify.

Wherefore the premises considered, he asks for judgment against said plaintiffs that he take nothing by his said suit, and that said pretended patent be canceled and held for naught, and for all costs and for general and special relief, &c.

X. B. SAUNDERS,
A. M. MONTEITH, AND
W. T. RUCKER,
Att'ys for Defendant, F. H. Ayers.

And the defendant, John Anderson, for further answer, alleges and shows to the court that he is occuping the said Maximo Moreno eleven league grant, as the tenant of his co-defendant,
14 Frank Ayers, and more especially 100 acres of said eleven league grant, including his improvements where he resides

is held by him under said Maximo Moreno eleven league title, said 100 acres fronting on the west side of Cottonwood creek, and to run back N. 71° W. from said creek, so as to include the improvements of this defendant. This defendant alleges and shows to the court that he had been in possession of said land for a long period before the date of the institution of this suit, holding the same adversely and in good —— for a period of more than twelve months before the date of the institution of this suit, and that he has made permanent and valuable improvements upon said land during the time he has held possession of the same in good faith as aforesaid of great value, viz., of the value of one thousand dollars; all of which this defendant is ready to verify. The premises considered, he says that said plaintiff ought not to recover anything against this defendant, and he asks for judgment against said plaintiff for all costs of this suit, &c. But if the court should hold that said plaintiff is entitled to recover against him and his landlord
15 and co-defendant the land aforesaid, then this defendant asks for a judgment against said plaintiff for the value of his improvements made in good faith as aforesaid, and for all costs and general and special relief, &c.

X. B. SAUNDERS,
A. M. MONTEITH, AND
W. T. RUCKER,
Att'ys for Defendant John Anderson.

Agreement of attorneys for both parties filed April 14th, 1879, as follows, to wit:

A. E. WATSON *vs.* FRANK AYERS *et al.*

In this cause it is agreed for the purpose of a trial that the plaintiff may read in evidence certified copy from the land office of the patent to the heirs of W. W. Daws, dated Sep't 16th, 1850, and it is admitted that plaintiff has all the title vested in said heirs by virtue of said patent. It is also agreed that def'ts may read in evidence land office translated copy of the Maximo Moreno eleven league grant issued in 1833, and it is admitted that defendants have all the title vested in said Maximo Moreno by virtue of said grant. The object of this agreement is to relieve parties of the necessity of deraigning title from said original grantees.

April 14th, 1879.

GOODRICH AND CLARKSON,
16 *Att'ys for Plaintiff.*
X. B. SAUNDERS,
W. T. RUCKER, AND
A. M. MONTEITH,
Att'ys for Def'ts.

Be it remembered, at the regular April, A. D. 1879, term of the district court of Bell county, Texas, the following orders were made, and the following proceedings had, to wit:

A. E. WATSON *vs.* FRANK AYERS *et al.*

Defendant demands a jury.

A. E. WATSON *vs.* FRANK AYERS *et al.*

Plaintiff has leave to file first amended original petition.

A. E. WATSON *vs.* FRANK AYERS *et al.*

Defendants have leave to file first amended original answer.

Verdict and Judgment.

And afterwards the following entry appears on the minutes of the court, to wit:

APRIL 29TH, A. D. 1879.

A. E. WATSON *vs.* FRANK AYERS *et al.*

This cause coming on to be heard on the 29th day of April, A. D. 1870, came the parties, by their attorneys, and announced ready for trial; thereupon came a jury of twelve good and lawful men, to wit, J. D. McMahon and eleven others, who were duly im-
17 paneled and sworn to try said cause, and after hearing the evidence, the argument of counsel, and the charge of the court, retired to consider of their verdict, and on the 30th day of April, 1879, returned into open court and announced to the court that they could not agree, whereupon a mistrial is had, and jury discharged and cause continued.

Admission of Defendants.

And afterwards on the 16th April, A. D. 1880, the following admission of defendants was filed in the district court of Bell county, to wit:

Suit Pending in District Court of Bell County. April Term, A. D. 1880.

A. E. WATSON *vs.* FRANK AYERS *et al.*

It is agreed and admitted by the defendants, for the purpose of this trial at this term of the court, that A. E. Watson, plaintiff in this cause, is entitled to all the right, title, and interest granted by the State of Texas to the heirs of Walter W. Daws on September 16th, A. D. 1850, said land patented being one-third of a league, described in said patent No. 542, vol. 8, and which said land is described in plaintiff's petition. But defendants say that said one-third of a league of land so patented as aforesaid to the heirs of Walter
W. Daws is covered by the grant of the government of Coa-
18 huila and Texas to Maximo Moreno of eleven leagues of land, as set forth more fully in defendants' petition, which said

eleven-league grant is an older and superior title to that of plaintiff's, and the title to which is in the defendants in this cause.

X. B. SAUNDERS,
W. T. RUCKER,
F. H. SLEEPER, AND
A. M. MONTEITH,
Att'ys for Defendants.

2d Order and Verdict, as follows:

Be it remembered that afterwards, to wit, the 19th day of April, A. D. 1880, this cause went to trial, and the jury returned into open court and announced that they could not agree; whereby a mistrial was had and the jury discharged.

Motion to Remove.

And afterwards, to wit, April —, 1880, the defendant moved the dis't court of Bell county to remove this cause to the Federal court in and for the northern district of Texas, in words, as follows, to wit:

19 *Motion to Remove Cause to Circuit Court of United States for the Northern District of Texas, at Waco.*

In District Court, Bell County, Texas, at Spring Term, A. D. 1880.

A. E. WATSON
vs.
FRANK AYERS *et al.* } No. 1240.

To Hon. Charles J. Jennings, special judge, presiding:

Your petitioner, Frank H. Ayers, who is a citizen of Jackson county, State of Mississippi, and defendant in this cause, respectfully shows that the plaintiff in this suit is a citizen of the State of Texas, and this defendant was, at the date of the institution of this suit, a citizen, as aforesaid, of said State of Mississippi; that this is a suit between citizens of different States, and the amount in controversy in this suit exceeds in value the sum of five hundred dollars, and there can be a final determination of the controversy in this suit, so far as he is concerned, without the presence of the other defendants as parties in the cause.

Wherefore he prays your honor that he be permitted to remove said cause for trial, together with copies of all papers therein, to the circuit court of the United States for the northern district of
20 Texas, at its next term, in the terms of the law, and as in duty bound, &c.

F. H. AYERS,
By SAUNDERS, RUCKER.
MONTEITH & SLEEPER, *Att'ys.*

Order on Motion to Remove Cause Granted.

Motion to Remove Cause to Circuit Court of U. S. for Northern District of Texas.

A. E. WATSON
vs.
FRANK AYERS *et al.* } No. 1240.

On this the 23d day of April, A. D. 1880, this motion coming on to be heard, and the matters and things therein contained be fully understood by court, it is ordered and decreed by the court that the said motion be, and it is hereby, granted.

21 *Bond for removal of Cause from Bell County to U. S. Circuit Court, Northern District of Texas.*

Suit pending in District Court of Bell County. April Term, A. D. 1880.

A. E. WATSON
vs.
FRANK AYERS *et al.* } No. 1240.

Know all men by these presents, that we, F. H. Ayers, as principal, and ——— and ———, as sureties, are held and firmly bound unto A. E. Watson, plaintiff in the above-entitled cause, in the sum of one hundred and fifty dollars, for the payment of which, well and truly to be made, we do hereby bind ourselves, our heirs, executors, and administrators, forever, jointly and severally, firmly by these presents; conditioned that the said F. H. Ayers shall well and truly enter in the circuit court of the United States for the northern district of Texas, at its next session, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in said cause.

Witness our hands and scrolls for seals, this 20th day of April, A. D. 1880.

F. H. AYERS. [SEAL.]
W. S. RATHER. [SEAL.]
G. M. McWHIRTER. [SEAL.]

Approved the 20th day of April, A. D. 1880, and filed the 20th day of April, A. D. 1880.

W. P. BLACKBURN, *D. C. Bell Co.*

22 The United States Circuit Court, 5th Circuit, in and for the Northern District of Texas, at Waco sitting.

Be it remembered that at a term of the circuit court of the United States, 5th circuit, for the northern district of Texas, held at Waco, for the October term, A. D. 1880, Hon. Andrew P. McCormick, district judge, presiding, among other the following proceedings were had:

MONDAY MORNING, *Octo.* 11*th*, 1880.

Court met pursuant to adjournment.

Present: The Hon. Andrew P. McCormick, judge, presiding, and the officers of court, U. S. att'y, marshal, and clerk.

A. E. WATSON
vs.
FRANK AYERS *et al.* } No. 34.

On the 8th day of October, A. D. 1880, came the plaintiff and the defendant, by their respective attorneys, and thereupon came a jury of twelve good and lawful men, who were duly impaneled, tried, and sworn to try this cause, to wit, 1, C. C. McCulloch; 2, Tony Hoeffner; 3, E. Harlan; 4, J. H. Morrison; 5, J. K. Proctor; 6, A. J. Moore; 7, Jas. F. Edrington; 8, A. E. Osborne; 9, T. J. McQueen; 10, M. D. Wynne; 11, V. B. Ritter; 12, W. Sedberry; and the jury having heard the evidence, the argument of counsel, and the charge
23 of court, retired to consider of their verdict, and on this, the 11th day of October, A. D. 1880, the jury came in open court and reported that they could not agree upon a verdict; whereupon they were discharged from further consideration of the case and a mistrial adjudged, and it was thereupon ordered that the case be continued on that account.

And afterwards, to wit, on April 11th, 1881, the following entry appears upon the minutes of the court:

MONDAY, *April* 11*th*, 1881.

Court met purusuant to adjournment. Present: The Hon. Andrew P. McCormick, judge, presiding, and the officers of court, U. S. att'y, marshal, and clerk.

A. E. WATSON
vs.
FRANK AYERS *et al.* } No. 34. April 9th, 1881.

On this 9th day of April, A. D. 1881, this cause being called for trial, the parties—plaintiff, A. E. Watson, and defendant, F. H. Ayers—announced ready for trial, and the defendant, John R. Hall, failed to appear.

Thereupon came a jury of twelve good and lawful men, to wit, C. C. Winscott, Milam Shelton, Sam. O'Neal, A. J. Lott, Henry
24 Kertin, W. W. Berry, J. R. Raines, Sam. Cox, Hamp. Capps, Hamp. Fancher, J. A. McKee, and C. N. Alexander, who, after hearing the evidence, argument of counsel, and charge of court, retired to consider of their verdict, and after due consideration returned the following verdict, to wit:

"We, the jury, find for the plaintiff.

"JAMES A. McKEE, *Foreman.*"

It is therefore considered, ordered, and adjudged by the court, that the plaintiff, A. E. Watson, do have and recover of and from the

said defendants, Frank Ayers and John R. Hall, the following-described tract of land, lying on Cottonwood creek, in Bell county, in the northern district of Texas, to wit:

Beginning at a stake from which a hackberry marked B. T. D. b'rs north 36 E. 143 varas; thence S. 71 E. at 107 vrs., passes corner of the Kavanaugh survey 3,767 varas, a stake in west line of J. O. Rice survey, from which double elm bears N. 26 W. 24 varas, another elm b'rs —; thence S. 19 W. with the line of J. O. Rice survey 2,550 varas to a stake, from which a triplicate elm bears S. 19 E. 36 vrs.; thence N. 71 W. 3,767 vrs. to a stake on hill in prairie; thence N. 19, E. 2,550 vrs. to the place of beginning.

25 And it is further ordered that a writ of restitution do issue to the marshal of said district, commanding him to eject said defendants, and all persons claiming by, through, or under, by right acquired since the 29th day of August, A. D. 1877, being the date of the institution of this suit, and to put the plaintiff in possession of the aforesaid land recovered by him.

It is further considered, ordered, and adjudged by the court, that the plaintiff do have and recover of and from said defendants all costs by him in this behalf expended, for which let execution issue.

26 *Motion for New Trial.*

And afterwards the following motion was filed, endorsed, to wit, "No 34. A. E. Watson *vs.* Frank Ayers *et al.* Motion for new trial. Filed April 11th, 1881. J. H. Finks, clerk." Which is as follows:

In the Hon. U. S. Circuit Court, Northern District of Texas, at Waco.

A. E. Watson *vs.* Frank Ayers. } No. 34.

And now comes the defendant Ayers and moves the court for a new trial, because—

1st. The court erred in the charge to the jury in this:

1st. There are three corners of the survey of Maximo Morino, grant established on the ground, to wit, the beginning corner or upper river corner, the lower river corner, and the N. W. corner of the grant. There was evidence tending to show that the line from the lower river corner was marked by the original surveyor to the N. E. corner, as claimed by the defendant. There was also evidence tending to show that a line running 155 varas north of a line running the N. W. corner, as ascertained by measurement

27 of the distance called for in the grant, and running the course called for in the grant for the N. E. corner was marked by the original surveyor, and can now be found, and when protracted 560 varas will intersect with the line marked for the south line within two varas of a tree marked by the original survey on the south of east line. On this evidence the jury should have been

charged that if they believe from the evidence that the lines so marked were made by the original surveyor, the point of intersection of these lines must be taken as the N. E. corner of the grant, whether the trees called for are found there or not.

2. That part of the charge relating to the measurement of 11 leagues of land by estimating the quantity embraced by giving a front allowed for an eleven-league grant, running the lines from the corners on the river, and extending back on the courses, called for a sufficient distance to embrace eleven leagues of land, is not applicable to this case, and was calculated to mislead the jury.

2. The court erred in not giving the charges asked by defendant.

SLEEPER, JONES & KENDALL,
Att'ys for Defendant.

28 *Order Overruling Motion for a New Trial.*

Motion submitted and judgment entered as follows:

A. E. WATSON
vs.
FRANK AYERS *et al.* } No. 34.

MONDAY, *April 18th*, 1881.

On this day came the parties, by attorneys, and thereupon came on to be heard the defendants' motion for new trial. The court being fully advised, and the law appearing to be for the plaintiff, it is hereby ordered that the motion be, and is, overruled.

29 *Writ of Possession.*

And afterwards, to wit, on the 2d day of May, A. D. 1881, writ of possession issued, endorsed as follows: No. 34. A. E. Watson *vs.* Frank Ayers *et al.* Writ of possession, issued May 2d, 1881. J. H. Finks, clerk. Writ of possession returned and filed May 13th, 1881. J. H. Finks, clerk. Which said writ is in words as follows, to wit:

United States Circuit Court, Fifth Circuit and Northern District of Texas, at Waco.

The President of the United States of America to the marshal of the northern district of Texas, Greeting:

Whereas, on the 9th day of April, A. D. 1881, A. E. Watson recovered a judgment in the United States circuit court in and for the norther district of Texas, at Waco, against Frank Ayers and John R. Hall, for the possession of a certain tract of land lying on Cottonwood creek, in Bell county, in the northern district of Texas, bounded and described as follows, to wit:

Beginning at a stake from which a hackberry marked B. T. D. bears N. 36° E. 143 vrs.; thence S. 71 E. at 107 vrs., passes
30 corner of the Kavanaugh survey 3,767 vrs., a stake in west line of J. O. Rice survey, from which double elm bears N. 26, W. 24 vrs., another elm bears ——; thence S. 19 W., with the line

of J. O. Rice survey, 2,550 varas to a stake from which a triple elm b'rs S. 19 E. 36 varas; thence N. 71 W. 3,767 varas to a stake on a hill on prairie; thence N. 19 E. 2,550 vrs. to the place of beginning, and all costs of suit as of record is manifest. Therefore, you are hereby commanded to eject said defendants, and all persons claiming by, through, or under them, by right acquired since the 29th day of August, A. D. 1877, being the date of the institution of this suit, and you are further commanded that you deliver to the said A. E. Watson the possession of said premises hereinbefore described, together with the sum of ——— dollars, costs of suit ——. These are, therefore, to command you, that of the goods and chattels, lands and tenements and estates of the said Frank Ayers and John R. Hall, you cause to be made the costs aforesaid, together with the legal fees and commissions for collecting the same, and also the costs of executing this writ, and have you said money, together with this writ, before our circuit court, on or before
31 the first day of next term thereof, to be begun and held at Waco, on the first Monday, being the 3d day of October next. Herein fail not, but due return make, as the law directs of this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court thereof, at Waco, this the 2d day of May, in the year of our Lord, eighteen hundred and eighty-one, and of American Independence the 105th year.

[SEAL.] J. H. FINKS,
Clerk of said Court.

Marshal's Return.

The U. S. marshal's return upon the writ of possession is in words and figures as follows:

Came to hand on May 3d, 1881, and executed on May 7th, 1881, by delivering unto A. E. Watson, pl'ff herein, the possession of the premises described in this writ, by going with s'd A. E. Watson to John Anderson, the only occupant of the land, and de-
32 manding from him the possession thereof, which was amicably surrendered by him to s'd A. E. Watson.

A. B. NORTON,
U. S. Marshal N. D. of T.,
By J. C. CHAPMAN, *Deputy.*

Fee	$3 00
Travel	5 40
	$8 40

33 *Bill of Exceptions of Defendants.*

A. E. WATSON *vs.* FRANK AYERS *et al.*

Be it remembered that on the trial of this case the following evidence was offered to the jury, viz:

It was admitted by both parties that the upper and lower corners

of the Maximo Morina eleven-league grant are extant, as called for in the original grant to Morina, and these corners are not in dispute.

F. W. Johnson testified that he was principal surveyor for Austin's colony in 1833, and that year began at a place where what is known as the reserve crosses San Andres or Little river, and for the purpose of getting a base line upon which to make surveys, he meandered upward to the junction of the Salado, Lampasas, and Leon rivers, called the Three Forks, in what is now Bell county, Texas. He meandered the river upwards on both sides to that point. On the east side of the San Andres, opposite where the Lampasas enters the San Andres river, he began to make a series of surveys on the south side of the San Andres river. The first made was the Maximo Morina eleven-league survey. The survey was commenced
34 at the point opposite the mouth of the Lampasas, as called for in the field notes, and a line was run thence on the course called for in the grant, and the chain was used in measuring the distance called for in the grant. The northwest, or second, corner called for in the grant was thus established by him, the distance giving out in the prairie. From this point a line was run the course called for in the grant, the distance called for in the grant, the chain being used to measure the distance. Several streams were crossed on this line. From the northeast or third corner so found, a line was run on the course called for in the grant to the San Andres river. This last line was marked, but not measured, because it was not usual to measure that line in such case, and was not necessary. It was admitted by defendant that the call from the northeast corner to a stream called for in the grant was some four thousand varas more than the distance called for, and on cross-examination, witness being asked how he accounts for so great a discrepancy, said he supposed it was because the distances called for on that line were not actually measured, but guessed at.

William Duty testified that he was with F. W. Johnson in 1833, when the Maximo Morino grant was surveyed, and was one of
35 the chain carriers. That the survey was begun at a point opposite the Lampasas, on the south side of the St. Andres, on the course called for in the grant. That they struck a bend in the river soon after leaving the beginning corner, and to avoid crossing the river, an offset was taken a sufficient distance to avoid the bend. The line began by him was reached by him after offsetting in the prairie, and was continued on the course called for the distance called for, and he carried the chain and assisted to measure the distance to the second corner. From this second corner a line was run for the third or northeast corner, and was measured, and he carried the chain along this line. At this corner the witness recollected that the party camped near a branch, from which they used water, and about one hundred yards from where they established the northeast corner. It was a glady, open country about where they made the corner. From this corner a line was coursed to the river, and marked, but not measured.

R. P. Bigham testified that in October, 1880, he went as surveyor with the defendant Ayers to the east line of the Maximo Morino

survey, connecting the northeast corner of the Maximo Morino survey with the lower river corner. That since 1854 he had
36 known that that line was well marked for an eleven-league survey, from the acknowledged lower corner to a point about twenty-six thousand nine hundred and sixty (26,960) varas, where his brother, Sam. Bigham, in that year pointed out to him two small hackberries, which he then took to be the two small hackberries called for at the northeast corner of the Morino grant. He did not recollect that he had ever traced the line beyond these hackberries until the time referred to above, when he went with defendant to the place where these two small hackberries were pointed out, and continuing on from the hackberries towards the northeast corner, reversing the course called for in the grant, he traced the line for perhaps one mile and a half, and after leaving the hackberries, or the place where they once stood on the course, he found several trees marked with blazes apparently as old as any of the blazes from the the lower river corner to the place where the hackberries stood. There were not many trees along the line which could have been marked; the country was open or glady, and some of the trees had been cut down along the line which might have been marked.
37 The last tree found by him beyond the hackberries in the direction of the northeast corner, as claimed by defendant, was a mile and a half or a mile and three-quarters from where the hackberries stood. The lines of eleven-league grants are marked with blazes, and from the blazes he saw on the trees beyond where the hackberries stood, he would have supposed the line he run in October, 1880, was a continuation of the Maximo Morino south line from the hackberries, if it had not been that when the hackberries were pointed pointed out to him in 1854, he took them to be the southeast corner, as called for in the grant.

This witness testified that after 1854 he and his brother, Sam. Bigham, were called upon as surveyors to survey off a conflict between the Maximo Morino grant and another survey of a league in the name of Hood, in order to compromise the claim of Hood and the owner of Maximo Morino grant. In making this survey, the Hood survey was recognized as in conflict with the Morino, as shown by the diagram hereto attached.

The witness does not recollect whether or not at that time he saw the line blazed as he found it in october, 1880; but one of the corners made in that compromise was on the Maximo Morino
38 line, as it was found in October last, and a tree was called for marked with the letter H, which was put upon it when that compromise was made, and on the same tree there was a blaze, apparently as old as any of the blazes found along the south line, and this tree was north of the point where the two hackberries stood.

This witness testified that in 1854, acting under an order of the district court of Bell county, he, together with his brother Sam Bigham, undertook to survey out and ascertain the boundaries of the Maximo Morino grant. They began their survey at the beginning corner, as called for in the field notes, and run the distance called for on the course called for in the grant, and set a pile of rocks for

the northwest corner. From this rock pile a line was drawn, the course and distance called for in the grant for the northeast corner, and from this point as the northeast corner a line was run the course called for in the grant to the San Andres or Little river. In the survey so made the distances called for in the grant for the crossing of streams of water did not correspond with the distances as found on the ground, and at the end of the distance called for as the northeast corner no hackberries were found, as called for in the
39 grant; and upon reaching the river, the trees called for for the lower river corner were not found by them. After this survey was made under the order of court, Sam Bigham found two small hackberries on the east line of the Morino survey, which he took to be the northeast corner of the survey, and which witness took to be the northeast corner. There was a plain marked line running from these two trees to the river corner, as now recognized by both parties to this suit, but the witness did not in 1854, when the trees were pointed out to him, trace the line in the course north beyond the hackberries in the direction of the northeast corner, as claimed by defendant, to ascertain whether or not the line was marked beyond the hackberries found by Sam Bigham, and he does not recollect that he ever attempted to find a marked line beyond the hackberries until in October, 1880. This witness said that there were hackberries along the line north and south of the two hackberries marked with old blazes.

Turner, the county surveyor of Bell county, testified that he had been recently employed by the defendant to trace a line from the point where S. W. Bigham found two small hackberries which
40 he, Bigham, took to be the northeast corner of the Morino survey, beginning at this point, as pointed out to him, and running the course reversed, as called for in the grant, found a marked line for about a mile and three-quarters. The line was marked with blazes and of the same age, apparently, with the marks on the same line south of the hackberries, and between the hackberries and the river; there were not many trees north of the hackberries which could have been marked. The country was open, most of the timber was small and brushy, and some of the trees which could have been marked along the line had been cut down. He found five or six trees marked with old blazes north of the place where the two hackberries stood, and appeared as if they might have been marked in 1833. Witness then undertook to find the north or back line; he went to the rock pile pointed out as the pile made by the Bighams in 1854, and began a survey from the rock pile the course and distance called for in the grant. The country was prairie from the rock pile about 7,000 varas in the course, and at the distance of about 7,000 varas a hackberry tree was found in the prairie standing 155 varas north of the line he was running. This tree being examined was found to have old blazes upon
41 it apparently of the same age as the blazes on the east line. The witness removed his compass to this tree, and continuing from thence the course which he had been running to a point where the line he was then running intersected the line he had

traced from the two small hackberries he found three trees, two of them, near an old road, marked with old blazes apparently as old as any of the blazes on the east line, and the point of intersection of the two lines was two varas from a tree marked with old blazes, which he had found in running from the two hackberries, known as the Bigham corner, towards the northeast corner, as claimed by defendant. Within seven or eight feet of this point of intersection, witness found a part of the body of a hackberry tree which had fallen down. The blazes found along the north and the south line all appeared to be of the same age; there were not many trees along — north or back line which were large enough to have been marked in 1833, and there were some along the line large enough, but were not marked. The place pointed out as the hackberry corner was in a thick woody country in Elm creek bottom. From the hackberry corner northward the line skirted Elm creek bottom, and the
42 timber was small and scarce. At the point of intersection of the north and east lines, as witness found it, there was a small branch. It was about 100 yards from the intersection.

For plaintiff:

Sam. Bigham testifies that he was a practical surveyor. That in 1854, under an order of the district court of Bell county, he surveyed the Maximo Morino grant. Beginning at the beginning corner, as called for in the grant, he ran the course and distance called for in the grant for the northwest corner, and set up a pile of rocks in the prairie. From thence he ran the course and distance called for in the grant for the N. E. corner, and found no hackberries, as called for in the grant at this corner. Then ran from the point thus found the course called for in the grant, to the San Andres or Little river and failed to find at the point at which he reached the river, the trees called for at the lower river corner of the grant. Afterwards, during the same year, he made another search for the east boundary line. He began at the beginning corner, as called for in the grant, and running from thence on the course called for in the grant from the northwest to the northeast corner, the proper distance for an eleven-league front, he expected to find
43 the east boundary line. But the distance gave out in the prairie. He then reversed the course, as called for in the grant, and ran a line towards the northeast corner, and when he struck the timber in Elm or Cow creek bottom, he searched for a marked line and failed to find it. Leaving the course he hunted around, and a short distance from the line which he had been running he discovered an old line marked with blazes; he followed this line beyond Elm or Cow creek until he came upon two small hackberries, and upon examing them he became satisfied they were the trees called for in the original grant, but he could not then recollect how they were marked. He knows they had blazes on them, and he was satisfied from the examination he made that they were the trees called for in the original grant. The marked line appeared to give out at these trees. The witness, at that time, searched for a marked line beyond the trees, but was unable to find any

marks beyond the hackberries. The witness, at that time, traced the line from the hackberries to the river, and found the line plainly marked wherever there was timber, and at the point of intersection with the river found the corner tree and bearing trees, as called for in the original grant. Wit-
44 ness pointed out the corner trees on the river and the two small hackberries to his brother, Pat Bigham, Capt. Bradford, and several others, the defendant Ayers among the number. This witness testified that if the north or back line of the Morino survey is where he placed it in making his first survey, beginning at the upper river corner, and running the courses and distances called for in the grant in the order named in the grant, the Daws survey, claimed by the plaintiff, would be in conflict with the Maximo Morino, and the Daws survey is a junior survey to the Maximo Morino. But if the Maximo Morino survey is run by commencing at the lower river corner, reversing the course called for, and following the marked line to the two small hackberries, and taking this as the northeast corner, and reversing the course and running a line the distance called for as the back line of the grant, and thus establishing the northwest corner; and from the northwest corner, so found, reversing the course, and running a line to the Leon or Little river, and thence following down to the corner called for as the beginning corner of the grant, the survey so made would not include any part of the Daws survey. This witness also testified that by running the Morino survey as claimed by
45 defendant, it would include between 13 and 14 leagues, and by running out the Morino survey by commencing at the lower river corner and running on the course the marked line to the two small hackberries as the northeast corner, and from thence establishing the back line of the survey, by reversing the course and running the distance called for for the back line, it would include between eleven and twelve leagues of land. If a survey should be made by taking the acknowledged river corners as the S. W. and S. E. corners, and running back the corners a sufficient distance to make eleven leagues, no part of the Daws survey would then be embraced in the Morino survey.

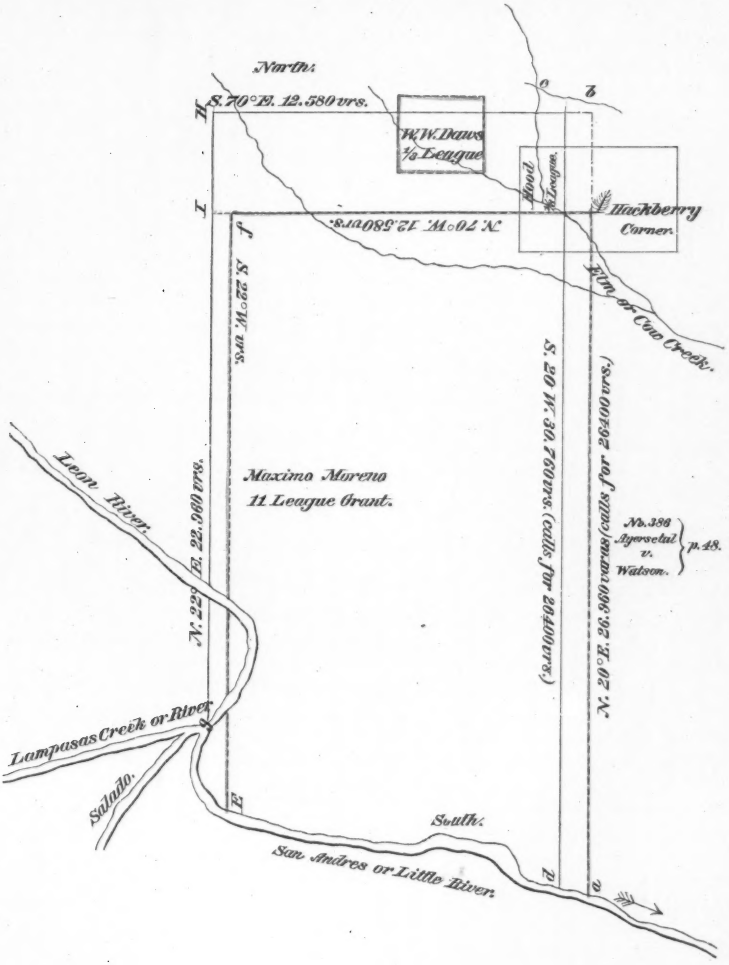
Captain Bradford testified that he was dist. surveyor in Bell county in 1856. That at that time the two small hackberries which S. W. Bigham found were pointed out to him. They had plain blazes upon them, and he took them to be the corner originally called for in the grant.

W. T. Rucker testified that he surveyed the Morino 11-league grant in 1871, under the orders of the district court of Bell county. He began at the beginning corner, as called for in the grant, and run the corners and distances called for in the grant, but they did not lead to the lower river corner, as acknowledged by both
46 parties. The east line, giving the courses and distances, would not be reached by about 570 varas, even if the line from the lower river corner was extended to the point of intersection with the north line, as he traced it. If the lines are run according to the patent calls for courses and distances, beginning at the point op-

posite the mouth of the Lampasas, then the east line would be about 4,000 varas longer than the distance called for in the grant. Upon actual measurement he found the distance called for in the field notes as the distance from Elm or Cow creek to the river to be correct. He found the call for distance or length of the east line was less than the distance between the place where the two hackberries once stood and the river by 560 varas—that is, if a line was run on the course reversed from the lower river corner to the place where the hackberries stood, it would exceed the length of the line as called for in the grant by 560 varas. The river above the "three forks" is known as the Leon; below the "forks," as Little river, or San Andres river. Where the course would cross the Leon river, from the beginning corner, opposite the mouth of the Lampasas, the river is more than sixty varas wide. It was admitted that by the law of 1833 a surveyor was not permitted to make a survey across a stream which was more than thirty varas wide. In mak-

47 ing the surveys to establish the boundaries, Rucker stated he did not find any of the calls in the grant for streams along the back line to correspond with the distances he found. He ran a line from the two hackberries, reversing the course, to the intersection of the west line, as he had made it by running from the beginning corner, crossing the streams called for, but not at their proper distances, and found no marked line. On all the lines run by him he found hackberries of various sizes and ages. The distance called for as the back or north line, to wit, 12,580 varas from the N. W. corner, as found by following the calls of the grant, would not reach the east line, as found marked from the lower river corner, by about 560 varas. The line on the diagram indicated by the letter *a* and the hackberry trees is well marked for the east boundary of the Morino grant. The line trom the hackberries to the letter B (dotted) was never traced by Rucker, and he does not know whether it is marked or not.

48 To int. 14th he furnishes the accompanying sketch:



The above plat represents the M. Moreno 11-league grant and the W. W. Daws ⅓ lea. sur. as described in my depositions. The black lines showing the Moreno grant as run from the beginning corner by courses and distances protracting the distance on the third line in order to reach the river. The violet-colored (red) lines representing the survey of said grant, as made by running from the lower river corner, following the marked line on the east to the point where the two small hackberries are said to have stood, from thence reversing the course and distance of the north line to a point
49 in the prairie, and from thence reversing course of the west

line, &c. The short dotted lines show how the two surveys might be connected. The foregoing sketch and explanation being given as an answer to direct int'y 14th.

W. T. RUCKER.

Upon this evidence the court charged the jury as follows, to wit:

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By the admission of the defendant the plaintiff is entitled to recover, unless the Maximo Morino eleven-league grant extends over all or a part of the Daws ½ of a league.

The defendant assumes the burden of showing that said eleven-league grant does embrace a part of the land patented to Daws and owned by plaintiff. There is no question as to the validity of the title, except so far as it may be affected by a conflict of boundaries. There is no dispute between the parties as to the extent of the front upon Little river, (St. Andres,) the corner on the river being clearly ascertained and accepted by the parties. Nor is there any question that the eastern line of said grant was clearly marked, and is now certainly well known to have been run and actually marked
50 for the distance of 26 or 27,000 varas, crossing Cow creek (now called by another name) at a given distance from the Little river, mentioned in the original field notes, and found to correspond with the actual distance between those streams on said line; it is also undisputed that the western line shows but one mark, and that about one hundred varas from the Little river.

The original field notes do not call for any land-mark at the intersection of the western line with the back or north line of the survey. At the intersection of the back line with the eastern line two small hackberries are mentioned as serving for a land-mark to designate the corner. Our purpose and your duty is to follow the tracks of the surveyor, so far as we can discover them on the ground with reasonable certainty, and where he cannot be tracked on the ground, we have to follow the course and distance he gives, so far as not in conflict with the tracks we can find that he made. In order to reconcile or elucidate the calls of a survey in seeking to trace it on the ground, the corner called for in the grant as the beginning corner does not control more than any other corner actually well ascertained, nor are we constrained to follow the calls of the
51 grant in the order said calls stand in the field-notes there recorded, but are permitted to reverse the calls and trace the lines the other way, and should do so whenever by so doing the land embraced would most nearly harmonize all the calls and the objects of the grant. There has been proof given you tending to show where the two small hackberries called for as the intersection of the eastern and north lines of the grant actually stood, at a distance from the lower corner on the river corresponding to the length of the eastern line of said grant. And if the proof satisfies you that the two hackberries mentioned in the testimony of the witnesses, Sam: and Pat Bigham, were the two hackberries called for and marked by the original surveyor as a corner of said grant, in

that case a line drawn from the point where said hackberries stood, N. 70 W., until it intersects the western line of said grant, will bound the eleven-league grant upon the north, and if the Daws ⅓ of a league is situated wholly north of this line, it does not conflict with said eleven-league grant, and you will find for the plaintiff.

If the proof does not satisfy you that said hackberries men-
52 tioned in the testimony are the ones called for and marked as a corner by the original surveyor. You will, from the whole proof, so fix the unmarked or disputed lines called for in the grant as in your judgment most nearly harmonizes the calls with the known corners and the undisputed lines. And if, from the proof, you fix these lines so as to include all or any part of the one-third league patented to Daws, you will find for the defendant. If you are not able to fix the disputed lines, or the disputed portions of the lines, with reasonable certainty from the proof, you may, taking the river as the base, and extend the eastern and western lines as that a line run N. 70 W., (or S. 70 E.,) connecting the extremities of said side lines, will embrace eleven leagues of land, and if said back line so run does not include any portion of the Daws ⅓ league, you will find for the plaintiff. If you can, from the proof, fix the lines of this grant in harmony with its calls and the known corners and undisputed line, the fact, if it be a fact, that said lines would include more than eleven leagues becomes wholly imma-
53 terial, and you will not consider the extent of the area further than as a circumstance to aid you in construing the other proof in the case. In seeking to fix these lines from the proof you will bear in mind that course controls distance, and marked trees control both course and distance.

The defendant, by his counsel, excepted to so much of the charge given as reads thus:

"If you are not able to fix the disputed lines, or the disputed portions of the lines, with reasonable certainty from the proof, you may, taking the river as a base, so extend the eastern and western lines as that a line run N. 70° W., (or S. 70° E.,) connecting the extremities of said side lines, will embrace eleven leagues of land, and if said back line so run does not include any part of the Daws ⅓ league, you will find for the plaintiff."

The defendant, by his counsel, asked the court to give the following charge, to wit:

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54 The court is requested to charge the jury that a call for two small hackberries, at the end of the distance on the course called for, having no marks on them to designate them from other trees of the same kind, and having no bearing trees to designate or locate them, is not a call for such a natural object as will control the call for course and distance. And the jury are not authorized to consider any evidence in this case about two small hackberries found by S. A. Bigham, and by him pointed out to various other persons which are found more than a mile from the point

where course and distance would place the S. E. corner of the 11-league grant.

SLEEPER, JONES & KENDALL,
Att'ys for Defendant Ayers.

Refused. A. P. McCORMICK, *Judge.*

Which charge was refused by the court.

The defendant asked the court to charge the jury further, as follows, to wit:

The defendant asks the court to charge the jury that the rules adopted by the courts as to the calls in a grant, giving
55 one call superiority over another; as, for instance, a call for for natural and artificial objects over a call for course and distance, are adopted for the purpose of identifying the actual survey that was made by the surveyor. An invariable rule is that the footsteps of the surveyor must be followed, and whenever the surveyor established the lines and corners on the ground there the survey must be located.

In this case the plaintiff contends that the surveyor who made the Maximo Morino survey either began at the pecan tree called for opposite the mouth of the Lampasas river, on the east bank on the San Andres river, and from thence meandered the river to the lower corner on the San Andres river, and thence run the distance reversing the course called for to the southeast corner, where the plaintiff claims to have found two small hackberries called for in the grant, and thence run the reverse course as called for the distance called for to the N. W. corner, and thus established the back or north line of the survey; or that the surveyor began at the forked cottonwood tree at the lower corner, and ran on the reverse course the distance called for, and from thence run on the re-
56 verse course as called for the distance as called for, and thus established the back line; and plaintiff contends that the survey of the Morino grant is found between this line and the river.

The defendant denies that the surveyor made the survey in this way, but says it was made by commencing at the beginning corner, as called for in the grant, and that the surveyor did actually run out and trace with the chain the upper or western line, as called for in the grant; except that an offset was made where the line would strike the river to prevent the crossing of the river; and that the N. W. corner of the grant was fixed at a point on the course called for in the grant at the end of the distance called for, and that from the N. W. corner so established the surveyor did actually run out and trace with the chain the distance called for on the course called for to the N. E. corner, and defendant claims that his land lies between this line and the river.

If the jury believe from the evidence that the Morino survey was

actually made on the ground, as contended for by the defendant, they will find for defendant.

SLEEPER, JONES & KENDALL,
Att'ys for Def't.

57 Refused. A. P. McCORMICK, *Judge.*

The court refused the charge so asked.

The defendant, by his counsel, excepted to the refusal of the court to give said two charges, and defendant still excepts to so much of the charge of the court as is quoted herein, and still excepts to the refusal of the court to give the charges asked by defendant, and prays that this his bill of exceptions may be signed, which is accordingly done.

April 20th, 1881.

A. P. McCORMICK,
U. S. Dis't Judge.

58 *Bond.*

Bond for writ of error, endorsed, to wit: No. 34. A. E. Watson *vs.* Frank Ayers *et al.* Appeal bond for $500.00. U. S. circuit court. Filed August 17th, 1881. J. H. Finks, clerk. Which is in words as follows:

In Hon. Circuit Court of the United States for the Northern District of Texas.

A. E. WATSON
vs.
F. H. AYERS. } No. 34.

Know all men by these presents, that we, F. H. Ayers, George Green, and M. L. Austin, are held and firmly bound unto A. E. Watson, appellee in above entitled and numbered cause, in the sum of five hundred dollars, to be paid to the said A. E. Watson, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, the day and date hereinafter written.

Whereas the above-named F. H. Ayers hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the hon. circuit
59 court of the United States for the northern district of Texas, on the 9th day of April, A. D. 1881.

Now, therefore, the condition of this obligation is such, that if the above-named F. H. Ayers shall prosecute his writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

In testimony whereof, we hereto set our hands and seals (using scrolls for seals), this 5th day of May, 1881.

F. H. AYERS. [SEAL.]
GEORGE GREEN. [SEAL.]
M. L. AUSTIN. [SEAL.]

Sealed and delivered in presence of—

Certificate of Solvency of Bond.

THE STATE OF TEXAS, *County of Bell:*

I, W. W. Upshaw, clerk of the county court, in and for said county of Bell, do hereby certify that F. H. Ayers and M. L. Austin, whose name appears signed to the annexd bond, in my opinion good and ample security for the amount therein specified; that M. L. Austin has property in said county subject to execution of
60 a large amount, and that if said bond was offered to me for approval, the same would be accepted and approved.

To certify which, I hereunto set my hand and impress of my official seal, at office in the town of Belton, on this, the 7th day of May, A. D. 1881.

[SEAL.] W. W. UPSHAW,
Clerk Co. Court, Bell County.

STATE OF TEXAS, *County of Milan:*

I, W. D. Paden, clerk of the county court of Milan county, do hereby certify that George Green, whose name appears signed to the annexed bond, is, in my opinion, good and ample security for the amount therein specified; that George Green has property in this county subject to execution of a larger amount, and that if said bond was offered to me for approval, the same would be accepted and approved.

To certify which, I hereunto set my hand and impress of my official seal, in the town of Cameron, on this, the 10th day of May, 1881.

[SEAL.] W. D. PADEN,
Clerk County Court, Milan Co., Texas.

61 I, J. H. Finks, clerk of the U. S. circuit court at Waco, do hereby certify that I consider the above bond sufficient for the costs in this case, rnd if offered to me for approval, I would approve the same.

Witness my hand and the seal of the U. S. circuit court, at Waco, this 17th day of June, A. D. 1881.

J. H. FINKS, *Clerk.*

Bond approved— DON A. PARDEE, *Judge.*

62 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Texas, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court, before you, between A. E. Watson and Frank Ayers and John R. Hall, a manifest error hath happened, to the great damage of the said Frank Ayers and John R. Hall, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 2d Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 5th day of July, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] J. H. FINKS,
Clerk of the Circuit Court of the United States,
Northern District of Texas, at Waco.

Allowed by—
DON A. PARDEE, *Circuit Judge.*

63 Endorsed: To Supreme Court of the United States. Issued July 5th, 1881. J. H. Finks, clerk.

64 The United States of America to A. E. Watson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Texas, at Waco, wherein Frank Ayers and John R. Hall are plaintiffs in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 5th day of July, in the year of our Lord one thousand eight hundred and eighty-one.

DON A. PARDEE,
Circuit Judge, 5th Circuit.

65 On this fifth day of August, in the year of our Lord one thousand eight hundred and eighty-one, personally appeared F. F. Downs before me, the subscriber, J. W. Watkins, clerk of the county of — Falls county, Texas, and makes oath that he delivered a true copy of the within citation to A. E. Watson.

F. F. DOWNS.

Sworn to and subscribed the fifth day of August, A. D. 1881. Given under my hand and seal of office, at Marlin, Falls county, Texas.

[SEAL.] J. W. WATKINS,
C. C. C., Falls Co., Tex.

Endorsed: Citation in error. In Supreme Court of the United States. Citation in error issued July 5th, 1881. J. H. Finks, clerk.

66 Writ of error is endorsed, to wit: To Supreme Court of the United States. Issued July 5th, 1881. J. H. Finks, clerk.

Citation in error endorsed, to wit: Citation in error. In Supreme Court of the United States. Citation in error issued July 5th, 1881. J. H. Finks, clerk.

I, John H. Finks, clerk of the circuit court of the United States, 5th circuit, in and for the northern district of Texas, at Waco, certify that the foregoing seventy pages in writing contain a full and true transcript of the record and all the proceedings had, as they appear of file and record in this court, in cause No. 34, entitled A. E. Watson *vs.* Frank Ayers *et al.*

In testimony whereof, I have hereunto set my hand and the impress of the seal of said circuit court, at Waco, this 19th day of August, A. D. 1881.

[SEAL.] J. H. FINKS, *Clerk.*

67 *Assignment of Errors.*

FRANK AYERS *et al.*, Plaintiff in Error,
vs.
A. E. WATSON, Defendant in Error.

The plaintiffs in error assign the following as the errors committed by the circuit court U. S. for the northern district of Texas, as appears from the record and proceedings in said cause:

1st. The court erred in taking jurisdiction of said cause, the same having been illegally removed from the district court of the State of Texas for the county of Bell to said circuit court.

2d. The court erred in giving the following portion of its charge to the jury: "If you are not able to fix the disputed lines or disputed portions of the lines with reasonable certainty from the proof, you may, taking the river as a base, so extend the eastern and western lines as that a line run N. 70° W. or (S. 70° E.) connecting the extremities of said lines, will embrace eleven leagues of land, and if said back line so run does not include any part of the Daws ⅓ league you will find for the plaintiff."

3d. The court erred in refusing to give the following charge
68 to the jury asked by plaintiffs in error: The court is requested to charge the jury that a call for two small hackberries at the end of the distance on the course called for, having no marks on them to designate them from other trees of the same kind and having no bearing trees to designate or locate them, is not a call for such a natural object as will control the call for course and

distance. And the jury are not authorized to consider any evidence in this case about two small hackberries found by S. A. Bigham, and by him pointed out to various other persons, which are found more than a mile from the point where course and distance would place the S. E. corner of the 11-league grant."

4th. The court erred in refusing the following charges to jury asked by plaintiffs in error: The defendant asks the court to charge the jury that the rules adopted by courts as to the calls in a grant giving one call superiority over another, as, for instance, a call for natural and artificial objects, over a call for course and distance, are adopted for the purpose of indemnifying the actual survey that wasmade by the surveyor. An invariable rule is that the footsteps of
69 the surveyor must be followed, and wherever the surveyor establishes the lines and corners on the ground there the survey must be located. In this case the plaintiff contends that the surveyor who made the Maximo Morino survey either began at the pecan tree called for opposite the mouth of the Lampasas river, on the east bank on the San Andres river, and from thence meandered the river to the lower corner on the San Andres river, and thence run the distance, reversing the couse called for, to the southeast corner, where the plaintiff claims to have found the two small hackberries called for in the grant, and thence run the reverse course called for the distance called for to the N. W. corner, and thus established the back or north line of the survey; or that the surveyor began at the forked cottonwood tree, at the lower corner, and ran on the reverse course the distance called for, and from thence run on the reverse course as called for the distance as called for and thus established the back line; and plaintiff contends that the survey of the Morino grant is found between this line and the river.

70 The defendant denies that the surveyor made the survey in this way, but says it was made by commencing at the beginning corner as called for in the grant, and that the surveyor did actually run out and trace with the chain the upper or western line, as called for in the grant, except that an offset was made where the line would strike the river to prevent the crossing of the river, and that the N. W. corner of the grant was fixed at a point on the course called for in the grant at the end of the distance called for; and that from the N. W. corner so established the surveyor did actually run out and trace with the chain the distance called for on the course called for to the N. E. corner, and defendant claims that his lands lies between this line and the river. If the jury believe from the evidence that the Morino survey was actually made on the ground as contended for by the defendant they will find for defendant."

Wherefore plaintiffs in error pray that the judgment of said circuit court may be reversed and the cause be remanded for a new trial.

(Signed) SLEEPER, JONES & KENDALL.

I, J. H. Finks, clerk of the circuit court of the United States,

5th circuit, in and for the northern district of Texas, at
71 Waco, certify that the above and foregoing four pages is a true copy of the assignment of errors filed in case No. 34, entitled A. E. Watson *vs.* Frank H. Ayers *et al.*, filed on the 22d day of September, A. D. 1881.

In testimony whereof, I have hereto set my hand and the impress of the seal of said circuit court, at Waco, this the 23d day of September, A. D. 1881.

[SEAL.] J. H. FINKS, *Clerk.*

Endorsed on cover: W. Texas C. C. U. S. No. 386. Frank Ayers and John R. Hall, plaintiffs in error, *vs.* A. E. Watson. Filed 12th October, 1881.

113-594

Supreme Court of the United States.

October Term, 1883.—No. 586.

FRANK AYERS AND JOHN R. HALL, PLAINTIFFS IN ERROR,

vs.

A. E. WATSON, DEFENDANT IN ERROR.

Brief for Plaintiffs in Error.

1. This is an action of ejectment brought by the defendant in error to try the title to a tract of land in Texas. The plaintiff below, Watson, claimed the land in dispute under a grant to the heirs of one Daws for one-third of a league. The great question in the case was whether the Daws grant was within the limits of an older grant known as the "Morino" grant for eleven leagues. It was conceded that if the "Daws" grant was not within the limits of the "Morino" grant, Watson was entitled to recover. The result depended on the location of the lines of the "Morino" grant.

The questions of law which have arisen grow out of the charge of the court below directing the jury as to the consideration which should guide them in making up their verdict. These questions of law arise from exceptions taken to the charge of the judge, and to his refusal to make certain charges requested by defendants below.

Besides the questions of law, which arose as above men-

tioned, the plaintiffs in error here insist that the Circuit Court of the United States never had jurisdiction of the case, on the ground that it had been illegally removed from the District Court of Texas, in which it originated.

2. Specification of the errors relied upon.

1st. The court erred in taking jurisdiction of said cause, the same having been illegally removed from the District Court of the State of Texas for the county of Bell to said (U. S.) Circuit Court.

2d. The court erred in giving the following portion of its charge to the jury: "If you are not able to fix the disputed lines or disputed portions of the lines with reasonable certainty from the proof, you may, taking the river as a base, so extend the eastern and western lines as that a line run N. 70° W. or (S. 70° E.,) connecting the extremities of said lines, will embrace eleven leagues of land; and if said back line so run does not include any part of the Daws one-third league, you will find for the plaintiff."

3d. The court erred in refusing to give the following charge to the jury, asked by plaintiffs in error: "The court is requested to charge the jury that a call for two small hackberries at the end of the distance on the course called for, having no marks on them to designate them from other trees of the same kind and having no bearing trees to designate or locate them, is not a call for such a natural object as will control the call for course and distance; and the jury are not authorized to consider any evidence in this case about two small hackberries found by S. A. Bigham, and by him pointed out to various other persons, which are found more than a mile from the point where course and distance would place the S. E. corner of the 11-league grant."

4th. The court erred in refusing the following charges to jury asked by defendant below: "The defendant asks the court to charge the jury that the rules adopted by

courts as to the calls in a grant, giving one call superiority over another—as, for instance, a call for natural and artificial objects over a call for course and distance—are adopted for the purpose of identifying the actual survey that was made by the surveyor. An invariable rule is that the footsteps of the surveyor must be followed, and wherever the surveyor establishes the lines and corners on the ground, there the survey must be located. In this case the plaintiff below contends that the surveyor who made the Maximo Morino survey either began at the pecan tree called for opposite the mouth of the Lampassas river, on the east bank of the San Andres river, and from thence meandered the river to the lower corners on the San Andres river, and thence run the distance, reversing the course called for, to the southeast corner, where the plaintiff claims to have found the two small hackberries called for in the grant, and thence run the reverse course called for the distance called for to the N. W. corner, and thus established the back or north line of the survey; or that the surveyor began at the forked cottonwood tree, at the lower corner, and ran on the reverse course the distance called for, and from thence run on the reverse course as called for the distance as called for, and thus established the back line; and plaintiff contends that the survey of the Morino grant is found between this line and the river."

"The defendant below denies that the surveyor made the survey in this way, but says it was made by commencing at the beginning corner as called for in the grant, and that the surveyor did actually run out and trace with the chain the upper or western line as called for in the grant, except that an offset was made where the line would strike the river to prevent the crossing of the river; and that the N. W. corner of the grant was fixed at a point on the course called for in the grant at the end of the distance called for, and that from the N. W. corner so established the surveyor did actually run out and trace with the chain the distance called for on the course called for to the N. E. corner; and defendant claims that his lands lie between

this line and the river. If the jury believe from the evidence that the Morino survey was actually made on the ground as contended for by the defendant, they will find for the defendant."

(3.) Argument—

1. The removal of the cause from the State court was illegal, for the following reasons:

(*a*) It did not appear that the matter in dispute exceeded, exclusive of costs, the value of $500.

The value of the matter in dispute is determined by the amount claimed in the declaration or petition. (Dillon on Removal of Causes, p. 63.)

The amount in controversy must be affirmatively shown. (Keith *vs.* Levi, 2 Fed. Rep., 743.)

Though the plaintiff may have been entitled to recover for more than $500, yet if the prayer for judgment be for less than that amount, the case could not be removed. (Lee *vs.* Watson, 1 Wall., 337.)

The amended petition of plaintiff below filed in the State court claims just $500 for his damages, instead of a sum exceeding $500, as required by the statute. (Rec., p. 4.)

(*b*) The application for removal was not made until after two trials, in which the jury failed to agree, such application being too late.

The act of 1863 provides that the petition for removal may be made before "the trial or final hearing of the suit."

His Honor Judge Field alludes to the statute of 1863, and leaves the question now being raised by us as an open question and worthy of consideration. (See Stevenson *vs.* Williams, 19 Wall., 572.)

The State and Federal courts do not seem to be harmonious on this point. It appears, however, that the law

is established, that the application for removal must be made before trial or hearing in the State court begins, and not during the progress of the trial. (Dillon, 75.)

The act of March 3d, 1875, (18 Stats. at Large, 470,) repealed the provisions of the second clause of section 639 of the Revised Statutes of the United States, (p. 113.) The above act of 1875 required that a petition for removal should be filed "before or at the term at which the cause could first be tried." The act of 1875 expressly repeals "all acts and parts of acts in conflict with the provisions of this act."

By virtue of this repeal, the application for removal was too late, and the Circuit Court could not acquire jurisdiction of this case.

"There is much ground for the position that the second subdivision section 639 (of the Revised Statutes) is superseded by the provisions of the act of 1875."

Ballard, judge, in Cooke *v.* Ford, 4 Cent. L. J., 560.

2. As to the exceptions to the charge of the judge, and refusals of the judge to make certain charges as requested.

(*a*) The first exception to the charge of the judge:

"If you are not able to fix the disputed lines or the disputed portions of the lines with reasonable certainty from the proof, you may, taking the river as a base, so extend the eastern lines as that a line run N. 70° west, (or south 70° E.), connecting the extremities of said lines, will embrace eleven leagues of land; and if said back line so run does not include any part of the Daws ⅓ league, you will find for the plaintiff."

We submit that the court below erred in the matter excepted to.

The facts in the case require that the Morino grant be located according to the plat at page 21 of the record, without regard to the so-called hackberry corner.

W. M. Boyce
For Pltf Error

113-594

Office Supreme Court U. S.
FILED
APR 12 1884
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

October Term 1883.—No. 386.

FRANK AYERS AND J. R. HALL, PLAINTIFFS IN ERROR,

vs.

A. E. WATSON.

Supplemental Brief for Plaintiffs in Error.

In 1833 an eleven-league grant of land situate in the county of Bell, State of Texas, was made to Maximo Morino. The field-notes of said grant are set forth at page 6 of the printed record, commencing at six lines from the top of the page.

F. W. Johnson testified on the trial below that he was principal surveyor for Austin's colony in 1833. He made the survey of the eleven-league Morino grant in that year. The survey was commenced at the point opposite the mouth of the Lampassas, as called for in the field-notes, and a line was run thence on the course called for in the grant, and the distance called for in the grant, the chain being used to measure the distance. The northwest or second corner called for in the grant was thus established by him, the distance giving out in the prairie. From this point a line was run the course called for in the grant, the distance called in the grant, the chain being used to measure the distance. From the northeast or third corner so found a

line was run on the course called for in the grant to the San Andres river. This last line was marked but not measured, because it was not usual to measure that line in such case, and was not necessary. Defendant below admitted that the call from the northeast corner to a stream called for in the grant was some four thousand varas more than the distance called for, and on cross-examination witness (Johnson), being asked how he acounted for so great a discrepancy, said he supposed it was because the distances called for on that line were not actually measured, but guessed at. (Record, p. 15.)

William Duty testified that he was one of the chain carriers when F. W. Johnson made the above-mentioned survey. He corroborated the statements of Johnson as to running the lines. At the third or northeast corner witness said he recollected that the party camped near a branch, and about a hundred yards from where they established the said northeast corner. From this corner a line was coursed to the river and marked, but not measured.

It is to be borne in mind that the upper and lower corners, marked on the plat as *a* and *g*, are admitted, and so are not in dispute. (Record, pp. 14–15.)

It would seem from this statement of the evidence, which we do not understand to be controverted, that the surveyor, Johnson, commenced at *g*, the beginning corner, as called for in the grant, and did actually run out with the chain the upper or western line, as called for in the grant, except that an off-set was made where the line would strike the river to prevent the crossing of the river; and that the N.W. corner of the grant was fixed at a point on the course called for in the grant, at the end of the distance called for, and that from the N.W. corner, so established, the surveyor did actually run out, mark, and trace with the chain the distance called for on the course called for to the N. E. corner; and from the N. E. corner did actually run and mark the eastern line to the lower station on

the Andres or Little river. The river itself furnishes the fourth line of the survey of the grant.

EXCEPTIONS.

First Exception:

The defendant excepted to so much of the charge of the judge as reads thus:

"If you are not able to fix the disputed lines, or the disputed portions of the lines, with reasonable certainty, from the proof, you may, taking the river as a base, so extend the eastern and western lines as that a line running N. 70° W., (or S. 70° E.,) connecting the extremities of said side lines, will embrace eleven leagues of land; and if said back line so run does not include any part of the 'Daws' one-third league, you will find for the plaintiff."

The judge below, we submit, erred in making this charge, for the following reasons:

A. The Morino grant is located by its field-notes, which are as follows:

"*Beginning* the survey at a pecan (nogal) fronting the mouth of the aforesaid creek (Lampassas creek), which pecan serves as a landmark for the first corner XX, a line was run to the north 22° east 22,960 varas, and planted a stake in the prairie for the second corner; thence another line was run to the south 70° east, at 8,000 varas, crossed a branch of the creek called Cow creek, at 10,600 varas, crossed the principal branch of said creek, and at 12,580 varas two small hackberries serve as landmark for the third corner; thence another line was run to the south 20° west, and at 3,520 varas crossed the said Cow creek, and at 26,400 varas, to a tree (palo) on the aforesaid margin of the river San Andres (or Little River), which tree is called in English "box elder," from which 7 varas to the south 28° west there is a cottonwood, with two trunks, and 16 varas to the south 11 east there is an elm 15 in. dia.; thence following up the river by its meanders to the beginning point." (Record, p. 6.)

The judge in effect charged the jury that they might, in determining the boundaries of the grant, disregard every consideration except the two acknowledged corners on the San Andres or Little river, and the quantity of land contained in a grant for eleven leagues. He disregards the line run from the beginning corner to the stake in the prairie for the northwest corner, and the line to the third corner, where the two small hackberries serve as a landmark for the third corner; also the line run and marked, but not measured, to the accepted lower river corner. Here we would remark that this line, though protracted beyond the call of distance provided for the line from the northeast corner, to the lower station on the river, is valid, because of the necessity of running such line from the northeast corner to the acknowledged lower corner on the river. The surveyor, F. W. Johnson, testified that it was not usual to measure such a line, and was unnecessary to do so. The northeast corner being established, it was a necessity to run the line direct from it to the lower corner on the San Andres or Little River.

The field-notes of the grant required lines to be run on the courses and distances of the lines from the upper corner on the river to the northwest corner, and from thence to the northeast corner, and from thence direct to the accepted lower river corner. The charge of the judge in effect takes away the right to run the lines from the upper river corner to the northwest corner, and from thence to the northeast corner, and thence to the lower river corner. The judge, therefore, evidently disregards the field-notes of the grant, and authorizes the jury to locate the grant by the single test of the quantity of land contained in an eleven-league grant, with two established corners, furnishing the base line, and a paralleligoin to be established on such base line. We respectfully submit that this is error in the judge which authorizes a new trial.

Second Exception:

"The court is requested to charge the jury that a call for two small hackberries, at the end of the distance on the course called for, having no marks on them to designate them from other trees of the same kind, and having no bearing trees to designate or locate them, is not a call for such a natural object as will control the call for the course and distance; and the jury are not authorized to consider any evidence in this case about two small hackberries found by S. A. Bingham, and by him pointed out to various other persons, which are found more than a mile from the point where course and distance would place the northeast corner of the eleven-league grant."

This charge was refused.

It appears in reference to the two hackberries in question that the line from the lower river corner to the northeast corner was traced by R. P. Bingham for perhaps one mile and a half from the two hackberries north. (Record, p. 16.) Turner, surveyor, states the same fact as to the distance north beyond the two hackberries that the marked line was found. (Record, p. 17.) There is no marked line from the two hackberries to the western line at *I.* (Record, p. 20.) It should be noted that when the survey by Johnson, public surveyor, took place in 1833, of the Morina grant, the eastern line was not measured. (Record, p. 15.)

It would seem, therefore, that the effort to establish the northeast corner at the two hackberries is a total failure.

We submit the judge below erred in not granting the charge requested in this regard.

Third Exception:

The defendant asked the court to charge the jury further, as follows, to wit:

"The defendant asks the court to charge the jury that the rules adopted by the courts as to the calls in a grant,

giving one call superiority over another, as, for instance, a call for natural and artificial objects over a call for course and distance, are adopted for the purpose of identifying the actual survey that was made by the surveyor. An invariable rule is that the footsteps of the surveyor must be followed, and, wherever the surveyor established the lines and corners on the ground, there the survey must be located.

"In this case the plaintiff contends that the surveyor who made the Maximo Morino survey either began at the pecan tree, called for opposite the mouth of the Lampasas river, on the east bank of the San Andres river, and from thence meandered the river to the lower corner of the San Andres river, and thence run the distance, reversing the course called for to the northeast corner, where the plaintiff claims to have found two small hackberries called for in the grant, and thence run the reverse course, as called for the distance called for to the N. W. corner, and thus established the back or north line of the survey, or that the survey began at the forked cottonwood tree at the lower corner, and ran on the reverse course the distance called for, and from thence run on the reverse course, as called for, the distance as called for, and thus established the back line; and plaintiff contends that the survey of the Morino grant is found between the line and this river.

"The defendant denies that the surveyor made the survey in this way, but says it was made by commencing at the beginning corner, as called for in the grant, and that the surveyor did actually run out and trace with a chain the upper or western line, as called for in the grant, except that an off-set was made where the line would strike the river to prevent the crossing of the river; and that the northwest corner of the grant was fixed at a point on the course called for in the grant, at the end of the distance called for; and that from the northwest corner so established the surveyor did actually run out and trace with the chain the distance called for, on the course called for, to the northeast corner; and defendant claims that his land lies between this line and the river.

"If the jury believe from the evidence that the Morina survey was actually made on the ground, as contended for by the defendant, they will find for defendant."

This charge was refused.

To the actual identification of the survey, the footsteps of the surveyor should be followed, by whatever rule they may be traced. (Stafford *v.* King, 30 Tex. R., 257.)

The general rules as to controlling calls are—1, natural objects; 2, artificial objects; 3, course and distance. The true location of the land is ascertained by the application of all or any of these rules to the particular case. (Ibid.)

Under some circumstances course and distance furnish the most reliable and certain evidence of the true locality of the grant. (Booth *v.* Strepplemen, 26 Tex. R., 436.)

A grant of land is not void because the amount granted exceeds that to which the grantee was entitled. (Maxey *v.* O'Conner, 23 Tex., 234.)

There are many cases where course and distance will control marks or boundaries. (Hubert *v.* Bartlett, 9 Tex. R., 97.)

Neither natural objects nor artificial marks should absolutely control course and distance, when the latter most truly indicate the proper locality of the land. (Jones *v.* Burgett, 46 Tex. R., 285.)

The fact that lines of a survey were not actually run will not invalidate a patent, provided the land can be identified with reasonable certainty. A survey may be made to include a considerably greater area than the certificate was entitled to. (Ibid.)

The courses should be first pursued, contracting or *extending* the distances as the case may require. (Phillips *v.* Myers, 45 Tex. R., 602.)

Course and distance will in some cases prevail. (26 Tex. R., 64.)

W. W. Boyce,
Counsel for Plaintiff in Error.

113-594

Office Supreme Court U. S.
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Supreme Court of the United States.

October Term, 1884. No. 74.

FRANK AYERS AND JOHN R. HALL, PLAINTIFFS IN ERROR,

vs.

A. E. WATSON, DEFENDANT IN ERROR.

FINAL BRIEF FOR PLAINTIFFS IN ERROR.

The supreme question in the case is as to the boundaries of the Marino grant.

The plaintiffs in error claim the boundaries marked by the letters *g*, (the upper river corner,) to 155 varas north of *H*; from the corner *H*, so extended, to 155 varas north of *b*; from *b* thus advanced north to *a*, the lower river corner. (See plat representing the Morino grant and the Daws ⅓ league, Record, p. 21.) If these boundaries are the proper boundaries, then the Daws ⅓ league grant, under which the defendant here claims, being a junior grant, and within the boundaries of the Morino grant, the verdict below should have been rendered for the plaintiffs in error here. The extension of the western line 155 varas is because of the old blazes on the north line found by the surveyor Turner, 155 varas north of the line from the rock pile made by the Bigham surveyors in 1854.

The black lines of the plat show the Morino grant as run from the beginning corner by courses and distances, protracting the distance on the third line in order to reach the river. (Record, p. 21.)

EVIDENCE AND OBSERVATIONS THEREON.

The upper and lower river corners of the Morino grant admitted. (Record, pp. 14, 15.)

The extent of the front on Little river (the south line) admitted. (Record, p. 22.)

There is no dispute as to the eastern line, from the lower river corner to the so-called Sam Bigham hackberries. (Record, p. 22.)

The western line has one mark, about one hundred varas from the Little river. (Record, p. 22.)

The original survey of the Morino grant, made in 1833, commenced at the upper corner on the Little river, and running the course and distance called for in the grant to the northwest corner, and thence to the northeast corner, where two small hackberries stood for the northeast corner, from thence to the lower corner on the Little river. This line marked but not measured. (Record, p. 15.) Offset at the beginning corner. (Record, p. 15.) The field-notes stating: "Beginning the survey, * * and a line was run to the north 22° east 22,960 varas, and planted a stake in the prairie for the second corner, &c." (Record, p. 6.)

The Morino survey the first survey made in the locality, (Record, p. 15,) and said to be the only 11-league survey.

The surveyor in 1833 camped near a branch, about one hundred yards from where he established the northeast corner. (Record, p. 15.)

Blazed trees, old blazes apparently as any on the eastern line, on north line. (Record, p. 18.)

Marked line for $1\frac{3}{4}$ miles on east line above the so-called Bigham hackberries, marked with *blazes* of the *same age apparently* as below the Bigham hackberries. (Record, p. 17.)

Blazing peculiar to 11-league grants. (Record, p. 16.)

The point of intersection of north and east lines was two

varas from a tree *marked* with *old blazes.* Within 7 or 8 feet of this point of intersection of *north* and *east* lines found body of hackberry tree which had fallen down. (Surveyor Turner, Record, p. 18.) There was a small branch about 100 yards from the point of intersection above mentioned. (Record, p. 18.)

It is deemed important to draw attention to the fact that the original surveyor in 1833 established the northeast corner about a hundred yards from a branch where they camped. (Record, p. 15.) This is, we submit, the same branch referred to by Turner, surveyor, in his recent survey. (Record, p. 18.)

It appears, then, to state our case briefly, that the two corners on the river are admitted, and the line between them, and the western line from *g* to *H*, is necessarily established by course and distance, sustained to a certain extent "by one mark about a hundred varas from the Little river," mentioned in the judge's charge. (Record, p. 22.) The northern or back line we consider established by the finding of "old blazes along the line, of the same age, apparently, of the blazes on the eastern line." (Turner's evidence, Record, p. 17.) Along this line he found three trees, marked with old blazes, "apparently as old as any of the blazes on the eastern line, and the point of intersection of the two lines (northern and the eastern lines) was two varas from a tree marked with old blazes, which he had found in running from the two hackberries known as the Bigham corner, toward the northeast corner as claimed by defendant" (below). (Record, p. 18.) From the *intersection* of the *northern* or *back* line is a *blazed line* to the *lower river corner* a. The eastern line from the two hackberries, known as the Bigham corner, to the lower corner being admitted.

In the face of this strong case, as we insist, in favor of the location of the lines of the Morino grant, we find the principal obstacle to be the contention of the defendant

here that the eastern line terminates at the two hackberries known as the Bigham corner. This objection is, we submit, without a particle of force. It is condemned beyond controversy.

First. The evidence is conclusive that the eastern blazed line, the mark peculiar to eleven-league grants, extends for nearly two miles north of this so-called Bigham corner. (Record, pp. 16, 17.)

Second. Rucker, surveyor, failed to find any marked trees on the line he ran between the so-called Bigham corner and the western line, (Record, p. 20,) though the so-called Bigham hackberry corner was in a thick-wooded country. (Record, p. 18.)

Third. It is condemned by the marked lines and intersection corner of the north and eastern lines found by Turner. (Record, p. 18.)

Fourth. It is condemned by the course and distance of the western and north lines.

Fifth. There are no bearing trees to witness the fact that the two Bigham hackberries are corner trees.

Sixth. The hackberries in question are "at a distance from the lower corner on the river corresponding to the length of the eastern line of said grant." (Judge's charge, Record, p. 22.)

This fact makes it absolutely certain that the hackberries in question cannot possibly be the northeast corner of the grant, because it is proved by the original surveyor and one of his chain-carriers that the eastern line was "only coursed from the northeast corner to river and marked, but not measured." (Record, p. 15.)

From the view of the evidence we have been considering, and other undisputed facts in the case, we submit that the condition of the case is as follows:

1. The two lower corners on the river are admitted, and also the line between them called the south line.

2. The eastern line is admitted as far as the so-called Samuel Bigham hackberry corner.

Beyond that point it is established up to the letter *b* on the diagram by the uncontradicted evidence of the surveyors Turner and R. P. Bigham.

We assume, then, that the eastern line is established from the lower river corner to the intersection with the north or back line.

3. The north or back line, running on the proper course, is established by the trees marked with *old blazes apparently of the same age* as the blazes on the east line followed by the surveyor Turner.

4. The western line, starting from the upper river corner, and run on its course and distance, would reach its intersection west of the north or back line, as established by Turner, by extending it 155 varas north of the rock pile set up by the Bighams surveyors in 1854 if they were correct in the distance run by them.

5. We submit that the plaintiff below, (the defendant here,) in admitting the eastern line from the lower river corner to the so-called Bigham hackberry corner, necessarily admitted that a line running from the northwest corner to the eastern line, on the provided course of that line, was the north or back line, though it should exceed the length of that line, as called for in the grant, by 560 varas, as stated by the surveyor Rucker, (Record, p. 20.) We submit that the plaintiff below in admitting the eastern line necessarily admitted the essential attributes of that line; one of which is that it is not too great a distance from the western line, or that the north line may be rightfully extended to it.

Further, as to the eastern line:

The plaintiff below (defendant here) admits that the line

running from the lower river corner, at "*a*," to the so-called Bigham hackberry corner, represented on the plat at page 21 of the Record, is the true eastern line. This admission is important as to the general fact that the eastern line is admitted for the greater part of its distance; that is to say, from the lower river corner, at *a*, to the so-called hackberry corner. For the reasons already stated it is clear that the eastern line extends beyond the so-called hackberry corner to the true northeast corner, at *b*, on the said plat.

The evidence on this point is so explicit that we here beg leave to refer to it.

R. P. Bigham testified "that in October, 1880, he went as surveyor with the defendant Ayres to the east line of the Maximo Morino survey, connecting the northeast corner of the Maximo Morino survey with the lower river corner." * * "He went to the place where these two small hackberries stood, [the two hackberries claimed by plaintiff below as the northeast corner,] and continuing on from the hackberries towards the northeast corner, reversing the course called for in the grant, he traced the line for perhaps a mile and a half, and after leaving the hackberries, or the place where they once stood on the course, he found *several trees marked with blazes, apparently as old as any of the blazes from the lower river corner to the place where the hackberries stood.* * * * The last tree found by him beyond the hackberries in the direction of the northeast corner, as claimed by defendant (below), was a mile and a half or a mile and three-quarters from where the hackberries stood. * * The lines of the eleven-league grants are marked with blazes." (Record, pp. 15 and 16.)

Turner, the present county surveyor of Bell county, testified "that he had been recently employed by the defendant (below) to trace a line from the point where S. W. Bigham found two small hackberries, which he (Bigham) took to be the northeast corner of the Morino survey. Beginning

at this point, as pointed out to him, and running the course reversed, as called for in the grant, found a *marked* line for a mile and three-quarters. The line was marked with *blazes*, and of the same age, apparently, with the marks on the *same line south* of the hackberries, and between the hackberries and the river; there were not many trees north of the hackberries which could have been marked." * * "He found five or six trees marked with *old blazes north of the place where the two hackberries stood, and appeared as if they might have been marked in* 1833." (Record, p. 17.)

Witness then undertook to find the north or back line; he went to the rock pile pointed out as the pile made by the Bighams in 1854, and began a survey from the rock pile the course and distance called for in the grant. The country was *prairie from the rock pile about* 7,000 *varas in the course*, and at the distance of about 7,000 varas a hackberry tree was found in the prairie, standing 155 varas *north of the line he was running.*

This *tree*, being examined, was found to have *old blazes* upon it, *apparently of the same age as the blazes on the eastern line.* Witness removed his compass to this tree, and continuing from thence the course which he had been running *to a point where the line he was then running intersected the line he had traced from the two small hackberries*, he found *three trees*, two of them near an old road, marked with *old blazes apparently as old as any of the blazes on the east line, and the point of intersection of the two lines was two varas from a tree marked with old blazes, which he had found in running from the two hackberries, known as the Bigham corner, towards the northeast corner*, as claimed by the defendant. (Record, pp. 17, 18.)

"Within seven or eight feet of this point of intersection, witness found a part of the body of a hackberry tree, which had fallen down." * * "At the point of intersection of the north and east line, as witness found it, *there was a small branch. It was about one hundred yards from the intersection.*" (Record, pp. 17, 18.)

There is, as we understand it, in effect, no evidence to the contrary of the evidence given by the surveyors, R. P. Bigham and Turner, as hereinbefore stated, that they had traced the old blazed line (the eastern line) from the two hackberries, claimed as the corner by Pat Bigham, for a mile and a-half or a mile and three-quarters north of the said last-mentioned hackberries. It is true the surveyor, Sam Bigham, said he had searched for this line in 1854 and failed to find it. This failure to find the line in question amounts to nothing as evidence when compared with the positive evidence of the finding and tracing of this part of the eastern line.

Just at this point we would call attention to the fact that William Duty, one of the chain-carriers in 1833, when the Morino grant was surveyed, testifies that "at this corner" (the northeast corner) "the witness recollected that the party camped near a branch from which they used water, and about one hundred yards from where they established the northeast corner." (Record, p. 15.) In this evidence the witness, Duty, is sustained by the present county surveyor, Turner, who testifies as follows: "At the point of intersection of the north and east lines, as witness found it, there was a small branch. It was about one hundred yards from the intersection." (See Record, p. 18.)

This fact, the existence of the little branch about one hundred yards from the northeast corner, proved by one of the original chain-carriers, and found at the same distance from the northeast corner by the surveyor, Turner, is, we consider, one of importance, in conjunction with other evidence, to establish the northeast corner.

Exceptions to the Charge of the Judge.

First Exception.—To so much of the charge of the judge as instructed the jury, as follows:

"If you are not able to fix the disputed lines, or the disputed portions of the lines, with reasonable certainty from

the proof, you may, taking the river as a base, so extend the eastern and western lines as that a line run N. 70° W., (or S. 70° E.,) connecting the extremities of said lines, will embrace eleven leagues of land, and if said back line so run does not include any part of the Daws one-third league, you will find for the plaintiff." (Record, p. 23.)

This ruling, we submit, is error, for the following reasons:

1st. Because it ignores the just influence of the course and distance of the west and north lines, starting from the upper river corner, as the original survey did, and the course of the east line from the northeast corner to the lower river corner, especially sustained as these are by the positive evidence that the east line is found marked with old blazes for about a mile and three-quarters above the so-called Sam Bigham hackberry corner, and the old blazes found along the northern line, establishing the northeast corner, and the northwest corner established 155 varas north of the point where the course and distance of the west line carry it, and one mark on the west line admitted. Also the two river corners and river line admitted. All the rules of location, we submit, are thus sacrificed to the one idea of the quantity of land mentioned in the grant, which, considering the evidence in this case, is a wholly immaterial matter.

Where the quantity of a tract of land is given, as well as the metes and bounds given, the metes and bounds will control the location, although the metes and bounds contain more or less than the quantity called for.

Barclay et al. *v.* Howell's Lessee, 6 Peters, 498.

Where the boundaries of land are fixed by unquestionable monuments, although neither courses, nor distances, nor the quantities of land correspond, the monuments must govern.

Perman *v.* Mead, 6 Mass., 131.

These monuments are either natural objects, as rivers, streams, springs, or marked trees.

Rix *v.* Johnson, 5 N. Hamp., 524.

It is no objection to the location of a grant that the quantity of land is greater than called for, or that the lines are prolonged greatly beyond the distance.

Tyler on Boundaries, p. 338.

In locating lands, marks made by the surveyor, as well as ascertained natural or artificial boundaries, are to prevail over course and distance. And it was so held, although the boundaries included 136,000 acres instead of 14,900, the number called for by the deed.

Sturgeon *v.* Floyd, 3 Rich., 80.

In the absence of calls, either for monuments or course and distance, then calls for quantity may be resorted to.

Welder *v.* Hunt, 24 Tex., 44.

2. Because it is an admitted fact in this case that the eastern line is established at least up to the so-called Bigham hackberry corner. This being the case, it is impossible, we submit, for the northeast corner of the eastern line to be carried lower down towards the lower river corner than the so-called Bigham hackberry corner.

It appears from Sam Bigham's evidence that if the northeast corner was established at the so-called Bigham hackberry corner, the Marino survey would include between eleven and twelve leagues of land; but if a survey should be made by taking the acknowledged river corners, and running back the corners a sufficient distance *to make eleven leagues*, no part of the Daws survey would then be embraced in the Marino survey. (Record, p. 19.)

From this view of the matter, we submit with much confidence that this ruling was error, and, as such, should be

overruled here, and the case should be sent back for a new trial.

As to the second exception (Record, p. 23):

The defendant (below) asked the court to charge in regard to the so-called Bigham hackberry corner, which charge was, in substance, that the jury were not authorized to consider any evidence in the case about the two hackberries in question, which are found a mile from the point where course and distance would place the northeast corner.

The court refused this charge.

This, we submit, was error.

There was practically no evidence to establish the hackberries in question as the northeast corner.

We have already considered the evidence, which shows the absolute failure of the effort made in the court below to establish the northeast corner at the point on the eastern line where the two so-called Sam Bigham hackberries stood. We do not think it necessary to repeat it.

It is error to charge upon a state of facts of which no evidence had been given. (Michigan *v.* Eldred, 9 Wall., 544.)

It is error to leave a question to the jury on which there is no sufficient evidence. (1 Black, U. S. R., 140.)

The charge of the court below being an error, it was proper for the defendant below to ask the court to make a new charge on the matter in dispute. The charge asked for by the defendant below was therefore proper, and should have been granted.

Third Exception. (Record, p. 24.)

This arises out of a prayer to the court below for a specific charge, (Record, p. 24,) as follows:

The first proposition is, in substance, that the giving of one call a superiority over another is for the purpose of identifying the actual survey made by the surveyor, the

rule being that the footsteps of the surveyor must be followed, and wherever the surveyor established the lines and corners on the ground, there the survey must be located.

The second proposition of the charge states that the plaintiff below contended that the surveyor of the Morino survey commenced at the lower river corner and ran on the course reversed, and established northeast corner where two small hackberries called for in the grant, and thence ran the reverse course, and thus established the northwest corner and north or back line.

Further, that the defendant below denies that the surveyor made the survey by running back on the east line from the lower river corner, but claimed that the survey was commenced at the upper river corner, and ran out and traced with the chain the upper or western line, establishing the northwest corner, and thence ran out and traced with the chain the course called for to the northeast corner, and defendant below claimed that his land lies between this line and the river; adding that: "If the jury believe from the evidence that the Morino survey was actually made on the ground, as contended for by the defendant, they will find for defendant."

By reference to the charge of the judge (Record, pp. 22, 23), it will be found that he considered there were three possible modes of determining the boundaries of the Morino grant.

First. By establishing the northeast corner at the so-called Bigham corner. In reference to this assumed northeast corner, the court charged as follows: "If the proof satisfies you that the two hackberries, mentioned in the testimony of the witnesses Sam and Pat Bigham, were the two hackberries called for and marked by the original surveyor as a corner of said grant, in that case" * * * "you will find for the plaintiff."

Second. "If the proof does not satisfy you that said hack-

berries (the so-called Bigham hackberries) mentioned in the testimony are the ones called for and marked as a corner by the original surveyor, you will, from the whole proof, so fix the re-marked or disputed lines called for in the grant as, in your judgment, most nearly harmonizes the calls with the known corners and the undisputed lines. And if, from the proof, you fix these lines so as to include all or any part of the one-third league patented to Daws, you will find for defendant."

Third. That the jury might, if they were unable to fix the disputed lines or portions of lines with reasonable certainty, they might take the river as a base, and so extend the eastern and western lines as that a line run north 70° west (or south 70° east), connecting the extremities of said lines so as to embrace eleven leagues of land.

In reference to the Bigham hackberries the charge was:

"If the proof satisfies you that the two hackberries mentioned in the testimony of the witnesses Sam and Pat Bigham were the two hackberries called for and marked by the original surveyor as a corner of said grant, in that case you will find for the plaintiff."

This was a direct and simple charge which the jury could understand. It did not perplex or confuse them by requiring them to "fix unmarked or disputed lines called for in the grant as in your judgment most nearly harmonizes the calls with the known corners and the undisputed lines," as the judge charged the jury in regard to the location claimed by the defendant below.

The court below should have made in regard to the defendant's location as simple a charge as in regard to the so-called Bigham hackberries.

The court should have charged somewhat in this manner:

"If the proof satisfies you that the old blazes along the east line, above the Bigham hackberries, and the old blazes along the north line, as testified to by the surveyors Turner

and P. Bigham, were the blazes made by the original surveyor in locating the grant, then you will find for the defendant."

The charge prayed for in the third exception should, we submit, have been granted.

AUTHORITIES.

The reason for running to the calls for objects, over course and distance, is not *only* because of greater certainty, but it is more beneficial to the grantee.

Tyler on Boundaries, p. 202.

The marks on the ground, indicating the lines originally run of an old survey, are the *best* evidence of the true location.

Idem, p. 202.

Rules in locating grant are:

First. The lines originally run.

Second. Lines run from acknowledged calls or corners.

Third. Lines run according to course and distance.

Idem, p. 282.

Where a marked line can be found it shall be pursued as far as may be done in its whole extent; but if it does not extend to the point of intersection, then it must be continued until the intersection is made, taking the course called or required by the deed.

George *v.* Thomas, 16 Tex. R., 89.

The identification of the actual survey in the purpose of the rules of evidence. The footsteps of the surveyors must be followed.

Stafford *v.* King, 30 Tex. R., 257.

A departure from calls, which will make the survey repugnant to the known calls, shall not be made.

Anderson *v.* Stamps, 19 Tex. R., 465.

Established corners and lines of the survey actually traced upon the ground must control an object which is uncertain and unknown.

Herbert *v.* Buillett, 9 Tex. R.
George *v.* Thomas, 16 Tex. R., 7.
Bass *v.* Michell, 22 Texas.

The surveyor who ran the line, or his chain-men, are the *best* witnesses to establish the true line as run.

Tyler on Boundaries, pp. 285–303.

What are boundaries are matters of law; *where* they are are questions of fact.

Bolton *v.* Lane, 16 Tex. R., 7.
Doe *v.* Paine, 4 Hawks, 64.
Cockrell *v.* Turner, 4 Monr., 63.
Hurley *v.* Morgan, 1 Dev. & Bat., 425.

As to the prolongation of lines, or shortening them, and how, as effected by course and distance.

Tyler on Boundaries, 201.

If the object can be reached by course, disregarding distance, it will be so done.

Tyler on Boundaries, 201–7.

Lines must be run to the known boundaries, instead of terminating by distance, and the marked line would control both course and distance.

Idem, 208.

The lines actually traced on the ground, as shown by the land marks, and not those of course and distance, (to the exclusion of the marked line,) constitute the boundary; especially is this true where the marked lines (where marked) are on the right course, and require only prolongation to harmonize every other material call, and disregarding distance.

Bolton *v.* Lane, 16 Tex. R., 112.

Where there are no monuments the land must be bounded by the courses and distances named in the patent.

McIver *v.* Walter, 4 Wheat., 444.

On a question of boundary the course of the last line is to be extended according to the magnetic meridian at the date of the deed, and not the true meridian.

Young *v.* Leeper, 4 Bibb, 503.

The rectangular figure will be preserved in preference to any other in fixing locations.

Massie *v.* Watts, 6 Cranch, 148.

A posterior line will never be reversed for the purpose of showing the termination of a prior one, unless the description of the posterior be more specific than that of the prior, and unless from the posterior a mistake in the prior can be clearly shown.

Harry *v.* Graham, 1 Dev. & Battle, 76.

If it appear that a subsequent line was actually run and marked, a prior line may be extended to it in order to ascertain the true corner.

Ring *v.* King, 4 Dev. & Bat., 164.

A survey must be closed in some way or other. If this can be done by following the course the proper distance, then it would seem that distance should prevail; but when the distance falls short of closing, and the course will do it, the reason for observing distance fails.

Doe *v.* King, 3 How. (Miss.), 125.

Where, in describing a boundary line, another known line is called for, and the distance gives out before reaching the line called for, the distance is to be disregarded.

Gilchrist *v.* McLaughlin, 7 Iredell, 310.

The great principle which runs through all the rules of location is, that where you cannot give effect to every part of the description, that which is more fixed and certain shall prevail over that which is less so.

Johnson *v.* McMillan, 1 Strobart, 143.

The footsteps of the surveyor must be followed.

Stafford *v.* King, 30 Tex. R., 273.

It is a matter of law which juries cannot control, but which must control them, that where lines of a survey have been run and can be found, they constitute the true boundaries, which must not be departed from or made to yield to course and distance, or to any less certain and definite matter of description.

George *v.* Thomas, 16 Tex. R., 85.

Bolton *v.* Lann, 16 Tex. R., 96.

Established corners and lines of the survey actually traced upon the ground must control.

Bass *v.* Michell, 22 Tex. R., 535.

A call for a marked tree will control course and distance.

Hubert *v.* Bartlett, 9 Tex. R., 97.

Urquhart *v.* Burleson, 6 Tex. R., 511.

If there be a defined beginning point, the boundaries may be established by course and distance alone.

Stafford *v.* King, 30 Tex. R., 257.

The courses should be first pursued, contracting or extending the distances, as the case may require, to make the survey close.

Booth *v.* Strippleman, 26 Tex. R., 436.

The location of a corner is a mixed question of law and fact.

Castleman *v.* Pouton, 51 Tex. R., 84.

A call for a corner which is ascertained by marked lines intersecting at the corner, will prevail over a call for quantity and distance.

Buford *v.* Gray, 51 Tex., 331.

The courses should be first pursued, as the case may require, to make the survey close.

Booth *v.* Strippleman, 26 Tex. R., 436.

Established corners and lines of the survey actually traced upon the ground must control.

Bass *v.* Michell, 22 Tex. R., 535.

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For Plaintiffs in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 74.

FRANK AYERS AND JOHN R. HALL, PLAINTIFFS IN ERROR,

vs.

A. E. WATSON, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

In addition to the statement of the case set out in brief for plaintiffs in error, the following additional statement is submitted:

This suit was originally begun in the district court of Bell county, State of Texas, by petition filed August 29th, 1877, in which court the cause was tried before a jury on April 29th, 1879, and again on April 16th, 1880. Upon both occasions the jury failed to agree; and afterwards the defendant, F. H. Ayers, filed his petition and bond to remove said cause to the circuit court of the northern district of Texas; which motion, on the 23d day of April, 1880, was granted. The petition for removal was in accordance with the act of March, 1875.

The cause being docketed in the circuit court at Waco, both parties appeared and went to trial Oct. 11th, 1880. The jury failing to agree, mistrial was adjudged. April 9th, 1881, a trial was had, which resulted in a verdict and judgment for the plaintiff.

There was no motion to remand the cause to the State court, and no bill of exceptions taken to the action of the circuit court in assuming jurisdiction of the cause.

ARGUMENT.

The plaintiffs in error cannot be heard to complain in this court of the action of the circuit court in taking jurisdiction of the cause—

1. Because it does appear from the record that the suit was between citizens of different States, and the amount in controversy exceeds in value the sum of five hundred dollars ($500).

Rec., page 9.

2. Because there was no motion to remand, and no bill of exceptions taken showing any error, and the action of the court was at most an irregularity, which the parties waived by going to trial.

Turner *v.* Farmers' Loan and Trust Co., 16 Otto, 554–5.

Before proceeding to discuss the other points made in the brief for plaintiff in error, the defendant in error presents the preliminary proposition that the bill of exception contained in the record cannot now be considered, because it does not appear from said bill that the exceptions were taken and allowed before the jury retired to consider of their verdict.

The bill, after giving the style of the case, begins with the statement: "Be it remembered, that on the trial of this case the following evidence was offered to the jury." Then follows a statement of the evidence in full. Then follows the copy of the judge's charge in full, and copy of charges asked by defendants, and the bill concludes as follows:

"The defendant, by his counsel, excepted to the refusal of the court to give said two charges, and defendant still excepts to so much of the charge of court as is quoted herein, and still excepts to the refusal of the court to give charges asked by the defendant, and prays that this his bill of exceptions may be signed; which is accordingly done.

"April 20th, 1881.

"A. P. McCormick,
"*U. S. Dist. Judge.*

Rec., page 25.

Verdict and judgment rendered April 9th, 1881; motion for new trial was overruled April 18, 1881.

Rec., page 13.

Phelps *v.* Mayer, 15 How., page 160.

The form of the bill of exceptions in this case differs from the bill in the case of R. R. Company *v.* Reeves, reported in 10 Wall, bottom page 181. In that case the bill stated that "on the trial of this cause the following *proceedings* were had." Then follow the testimony, the prayer for instructions, the refusal of the court to grant them, and the instructions which the court did give, and the statement that the defendant excepted to the action of the court in refusing instructions aforesaid, and also in giving charge aforesaid, and also in overruling his motion for a new trial. In the case at bar the only statement is, "Be it remembered, that on the trial of this case the following evidence was offered to the jury"—*not that the following proceedings were had at the trial.* The bill closes with the statement that the defendant excepted to the refusal of the court to give said chages, and defendant still excepts, etc. This bill appears to have been signed eleven days after the trial; whether before or after the final adjournment of the court for the term does not appear.

See also the case of Dredge *v.* Forsyth, 2 Black, 567.

If, however, the bills of exception are to be considered as a part of the record, we reply to the argument on the first exception. The part of the charge complained of was warranted by the evidence.

The S. E. and S. W. corners of the grant as described in the field notes were well known and established on the ground.

San Anders or Little river, connecting these two corners, forms the southern boundary of the grant. The eastern line of the grant is well marked. The position of the northern line is the point of dispute. Measuring from the S. W. corner N. 22 E., 22,960 vrs., the course and distance called for in the grant will place the northern line about 4,000 vrs.

further north, than to begin at the S. E. corner of the grant and measure N. 20 E. 26,400 vrs., the course and distance called for in the grant for the eastern line.

See Rucker's testimony, pp. 19, 20.

There was evidence tending to locate the two small hackberries called for in the grant as a landmark for the N. E. corner. There was also some evidence of marked trees on a line north from said hackberry trees.

Rec., page 17; see also plat, page 17.

It was also in proof that if a survey should be made by taking the acknowledged river corners as the S. W. and S. E. corners of the grant, and running back on the courses called for in the title a sufficient distance to include eleven leagues of land, no part of the Daws survey claimed by plaintiff would be included within the lines of said eleven-league survey as thus established.

The court, in a previous portion of the charge, had instructed the jury as follows (Rec., pages 22 and 23):

"There has been proof given you tending to show where the two hackberries called for, as the intersection of the eastearn and northern lines of the grant, actually stood at a distance from the lower corner on the river corresponding to the length of the eastern line of said grant; and if the proof satisfies you that the two hackberries mentioned in the testimony of the witnesses, Sam. and Pat. Bigham, were the two hackberries called for and marked by the original surveyor as a corner for said grant, in that case a line drawn from the point where said hackberries stood, N. 70 W., until it intersects the western line of said grant, will bound the eleven-league grant upon the north, and if the Daws one-third of a league is situated wholly north of this line, it does not conflict with said eleven-league grant, and you will find for the plaintiff.

"If the proof does not satisfy you that said hackberries mentioned in the testimony are the ones called for and marked as a corner by the original surveyor, you will, from the whole proof, so fix the unmarked or disputed lines called for in the grant as in your judgment most nearly harmonize the calls with the known corners and the undisputed lines.

And if from the proof you fix these lines so as to include all or any part of the one-third league patented to Daws, you will find for the defendant."

See the case of Williamson *vs.* Simpson, 16th Tex., p. 439, where a similar charge was given under a similar state of facts, and approved by the supreme court of Texas. See also case of Phillips *vs.* Ayres, 45 Tex., 601, which was an adjudication upon the same title now in question.

Upon the second exception we submit that the charge requested ignored the facts in evidence before the jury. See the testimony of Sam. Bigham, Pat. Bigham, and Capt. Bradford, set out in the bill of exceptions. These witnesses testified that they had been official surveyors of that district, and had seen the two small hackberry trees as long ago as 1854; that an old marked line, leading from the marked corner on the river, had been traced by them to the said hackberry trees. They were all satisfied, from their examination, that these trees were marked for the original N. E. corner.

(Rec., pp. 18, 19.)

As to the third exception, the charge requested is contrary to the law of this case as laid down in the case of Phillips *vs.* Ayres, 45 Tex., 601, before referred to. The testimony upon which the charge is based did not undertake to show whereabouts upon the ground any of the lines or corners of said grant were located, but did undertake to contradict the rule of law laid down in the case of Phillips *vs.* Ayres, viz: The order in which the surveyor gives the lines and corners in his certificate of survey is of no importance to find the true position of the survey. Reversing the courses is as lawful and persuasive as following the order of the certificate.

45 Tex , 607.

L. W. Goodrich,
Counsel for Deft. in Error.